Calendar No. 511

97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-359

ANTITRUST EQUAL ENFORCEMENT ACT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 995

together with

ADDITIONAL VIEWS

APRIL 26 (legislative day, APRIL 13), 1982.—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
80-417 O WASHINGTON: 1982

5523-6

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APRIL 26 (legislative day, APRIL 13), 1982.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 995]

The Committee on the Judiciary, to which was referred the bill (S. 995) to provide for contribution with respect to damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act, having considered the same, reports favorably thereon, and recommends that the bill do pass.

I. PURPOSE

During the past 20 years, the nature of antitrust enforcement litigation and remedies has undergone rapid change. Criminal, as well as civil, sanctions for antitrust violations have been expanded, so that the culpability of individuals involved in unlawful activity has become a major factor in antitrust deterrence. In 1976, Congress strengthened the criminal penalties for violations of the Sherman Act, making such violations felonies rather than misdemeanors, lengthening the maximum imprisonment to three years from one year, and increasing individual and corporate fines to $100,000 and $1 million, respectively.

In addition, the development of the class action, the parens patriae doctrine, the Hart-Scott-Rodino Act, and the Antitrust Procedural Improvements Act of 1980 all reflect a national policy of strengthening the antitrust laws in order to preserve the competitive structure of our free market economy.

Since the passage of the Clayton Act in 1914, which authorized private damage actions to be brought by anyone "injured in his business or property by reason of anything forbidden in the antitrust

laws . . ." (15 U.S.C. § 15), private damage actions have been an important antitrust enforcement tool. As the Supreme Court has noted on several occasions, plaintiffs seeking damages serve as "private attorneys general," helping to police effectively the economy against would-be antitrust violators.

While the effectiveness, as well as the continued need for, the private damages action is beyond dispute, the committee is concerned with the current process by which the allocation of antitrust damages is determined.

S. 995, the Antitrust Equal Enforcement Act is designed to rationalize the process of the allocation of damages in an antitrust price-fixing suit, so that price-fixers will pay their fair share of any damages awarded and so that businesses which find themselves in the midst of a price-fixing suit are not left responsible for the liability caused by another's wrongdoing. As we seek more effective enforcement of the antitrust laws against price-fixers in an effort to effectuate the central purpose of the antitrust laws—to provide consumers with better products at lower prices by maintaining competitive markets—we must also assure fairness as among defendants, including those who may be at most tangentially related to the charged wrongdoing and who in fact may be wrongly accused. Laws which are legitimately designed to deter and punish wrongdoers should not be used to permit plaintiffs to settle with a few defendants and then extract larger, or at least proportionately larger payments from other defendants who would be faced with potential liabilities well beyond their own market shares.

Currently, under the principle of joint and several liability, an alleged price-fixer is considered liable for the damages attributable not only to its own particular sales to the plaintiff or plaintiffs, but also for the damages attributable to all co-conspirators. Accordingly, each defendant faces the possibility of liability for treble the entire damages caused by all defendants combined.

In many cases, defendants can arrange to enter into sharing agreements—usually based on relative sales—to apportion the liability among themselves in a way that will avoid grossly disproportionate payments by any one defendant. The committee notes that in the Brief of the United States recently submitted to the Supreme Court in the *Texas Industries* case, the Solicitor General specifically endorsed such agreements. Brief of the United States as Amicus Curiae in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.* (No. 79–1144) at 25. As this committee's report on S. 1468, the predecessor of the preesnt bill, made clear, this committee likewise concludes that such agreements are consistent with public policy and the effective enforcement of the antitrust laws. S. 995 will in no way affect the validity of sharing agreements in pending cases which will continue to be fully enforceable.

The record makes it clear, however, that such sharing agreements are not always possible, especially in nonconcentrated industries with numerous small and medium sized companies in addition to large multinationals and conglomerates. In cases where sharing agreements cannot be worked out, the effect of this open-ended liability on a smaller defendant who wishes to defend its innocence may be to drive it into settlement, even if it believes that the risk of its being found liable is small. It also means that if one or more defendants settle a

price-fixing case for less than their proportionate share of the total liability, without persuading the plaintiff to agree not to seek treble damages with respect to the settling defendants' sales, those who remain in the litigation face the prospect of enormous liability since they would remain liable even for treble the damages caused by settling defendants, as well as their own, less the amount paid in settlement.

One result of our present system is to allow plaintiff's counsel to settle relatively inexpensively with some defendants, thus placing great pressure on the remaining defendants to settle at a higher rate rather than run the risk of huge liability for not only their own damages but also for the damages of those who opted out early and cheaply.

S. 995 will end the abuse of these "whipsaw tactics" by relieving a defendant of the liability attributable to the defendants who settle and by allowing the defendant to seek contribution from those conspirators who do not settle (or who are not sued by the plaintiff). The defendant could do this in the same action or by instituting a separate action. As a practical matter, this would mean that in most cases (except, for example, where a co-conspirator was insolvent or not present in the United States), a losing defendant would be liable only for damages caused by its own sales. S. 995 would not, however, change the principle of joint and several liability and thus would not impair the plaintiff's rights against any defendant. It would affect only the relationship among defendants by putting those defendants who cannot work out sharing agreements on roughly the same litigation footing enjoyed by those who can obtain agreements.

This right of contribution should not overly complicate antitrust price-fixing cases or cause the plaintiff to lose control over its case. In cases where the claim for contribution was brought as a cross-claim or by way of impleader in the main action, the plaintiff's claim would in no way be affected and the judge would have the discretion to sever or stay the contribution claims.

In those situations where a defendant chose to pursue its right of contribution in a second action, the defendant would have to prove that the alleged co-conspirator, if not a party to the original action, was in fact a co-conspirator. That, of course, would be a matter among defendants and would in no way affect the plaintiff's rights or complicate its lawsuit.

The restructuring of the manner in which damages are apportioned in an antitrust price-fixing suit will introduce added elements of fairness and rationality as well as deterrence into the litigation process as a whole. No longer will a defendant who chooses to defend itself rather than bow to settlement pressure be left potentially "holding the bag." At the same time, as each member involved in the conspiracy will be required to pay its fair share of the liability, each defendant will be aware that it cannot escape the responsibility for its own acts and will behave accordingly.

II. Background and Need for Legislation

1. The *Texas Industries* decision

On May 26, 1981, the Supreme Court, in the case of *Texas Industries, Inc.* v. *Radcliff Materials Inc.*, — U.S. —, 101 S. Ct. 2061 (1981)

unanimously held that the federal courts could not fashion a right to contribution in antitrust cases.[1] Resolving conflict among the circuit courts [2] on this issue, the Court found that there did not exist a basis in either federal statutory law or in the federal common law to fashion a right of contribution.[3]

Given the absence of an express right of action for contribution in the antitrust laws, the Court focused on whether such a right existed by implication. Noting "the absence of any reference to contribution in the legislative history [of the Sherman or Clayton Acts], or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting," the Court concluded that Congress neither expressly nor implicitly intended to create a right of contribution. Similarly, the Court refused to find a right to contribution under federal common law, noting that "there is nothing in the [Clayton Act] itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted." Thus, the Court concluded, "(w)e are satisfied that neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution sought here."

In deciding against a right of contribution for the petitioner Texas Industries, the Court was careful to avoid comment on the merits of contribution itself, nor did it address the issue of claim reduction. While noting that the basic issue raised by contribution was "whether sharing of damage liability will advance or impair the objectives of the antitrust laws," and setting forth the arguments raised by both sides of the issue,[4] the Court recognized Congress as the appropriate forum to address the issues raised:

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[1] The facts giving rise to this case are as follows: Petitioner Texas Industries, Respondent Radcliff Materials, and the two other respondents named in the case, all manufacture and sell concrete in the New Orleans, La. area. In 1975, the Wilson P. Abraham Construction Co. sued Texas Industries, alleging that Texas Industries and certain unnamed concrete companies had conspired to raise prices for concrete in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). Through discovery, Texas Industries learned that Abraham Construction believed that Radcliff Materials and the other two respondent concrete firms participated in the alleged price-fixing scheme. Texas Industries then filed a third-party complaint against Radcliff Materials and the other two firms, seeking contribution from them should Texas Industries be held liable in the action filed by Abraham Construction.

The district court dismissed the third party complaint for failure to state a claim upon which relief could be granted, holding that Federal law does not allow an antitrust defendant to recover contribution from co-conspirators. On appeal, the Fifth Circuit affirmed the lower court's decision, holding that even though the antitrust laws do not expressly afford a right to contribution, the issue should be resolved as a matter of Federal common law. The court concluded that no common-law rule of contribution should be fashioned by the courts.

[2] The Fifth and Tenth Circuits have denied contribution. See *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (5th Cir. 1979); *Olson Farms Inc.* v. *Safeway Stores, Inc.* 1979–2 Trade Cas. (CCH). ¶ 62,995 (10th Cir.), rehearing en banc granted (Dec. 27, 1979). The Eighth Circuit has granted contribution. See *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.* 594 F. 2d 1179 (8th Cir. 979).

[3] The court utilized this same analysis in the recent case of *Northeast Airlines, Inc.* v. *Transport Workers Union*, — U.S. —, 101 S. Ct. 157 (1981) in which it addressed a similar question of a right to contribution under the Equal Pay Act of 1963.

[4] The Court summarized the arguments for and against contribution as follows:

> Proponents of a right to contribution advance concepts of fairness and equity in urging that the often massive judgment in antitrust actions be shared by all the wrongdoers. In the abstract, this position has a certain appeal: collective fault, collective responsibility. But the efforts of petitioner and supporting *amici* to invoke principles of equity presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing. Moreover, traditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts, and, in the context of one wrongdoer suing a co-conspirator, these standards similarly suggest that parties generally *in pari delicto* should be left where they are found . . .
>
> The proponents of contribution also contend that, by allowing one violator to recover from co-conspirators, there is a greater likelihood that most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing. It is argued that contribution would thus promote more vigorous private enforce-

The policy questions presented by petitioner's claimed right to contribution are far reaching. In declining to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.

The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. As in *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980): "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the court." Accord *United States* v. *Topro Associates*, 405 U.S. 596, 611–612 (1972).

The committee is cognizant of its responsibility to study the complex issues raised by the concept of contribution, and to resolve the numerous questions this matter presents. In both this Congress, and the Ninety-Sixth Congress as well, the committee conducted several days of hearings on contribution legislation and received the considered comments of numerous individuals well-qualified to address the issues raised.

As the next section of this report suggests, the concept of contribution is by no means an anomaly to our federal legal system, nor to our state systems. The question is, of course, whether contribution should be implemented under our federal antitrust laws. After careful consideration of all the issues raised by both the proponents and opponents of contribution, the committee has concluded that contribution is proper in federal antitrust cases, and that S. 995 embodies the most appropriate method to create such a system.

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ment of the antitrust laws and thereby deter violations, one of the important purpose of the treble damages action under § 4 of the Clayton Act. See, *e.g.*, *Reiter* v *Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Brunswick* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968). Independent of this effect, a right to contribution may increase the incentive of a single defendant to provide evidence against co-conspirators so as to avoid bearing the full weight of the judgment. Realization of this possibility may also deter one from joining an antitrust conspiracy.

Respondents and *amici* opposing contribution point out that an even stronger deterrent may exist in the possibility, even if more remote, that a single participant could be held fully liable for the total amount of the judgment. In this view, each prospective co-conspirator would ponder long and hard before engaging in what may be called a game of "Russian roulette." Moreover, any discussion of this problem must consider the problem of "overdeterrence," *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business agreements. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441–442 (1978).

2. HISTORY OF CONTRIBUTION

The first recorded discussion of the law regarding contribution appears in *Merryweather* v. *Nixon*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), which established the English common law rule against contribution among joint tortfeasors. In 1935, however, England abandoned the *Merryweather* rule when Parliament passed the Law Reform (Married Women and Tortfeasors) Act 1935 (25 and 26 Geo. 5c30), which applies to all torts and allows contribution.[5]

In the United States, the law has evolved away from a strict no contribution rule. "The common-law refusal to let . . . loss be spread among all the tort-feasors, because the claimant for contribution is a 'badman' and hence not entitled to the aid of the courts, is misplaced prudery," Gregory, *Contribution Among Joint Tort-feasors: A Defense*, 54 Harv. L. Rev. 1170 (1941).

In discussing the *Merryweather* decision, the court in *Knell* v. *Feltman*, 1974 F.2d 662, 666 (D.C. Cir. 1949) noted:

> Due to the brevity of the report and a misleading headnote, the *Merryweather* case has often been cited in support of the sweeping proposition that no contribution can be had between joint tort-feasors. It is plain, however, that the ruling of the case was limited to the denial of contribution between willful or intentional wrongdoers.
>
> Nevertheless, after a period of adherence to the true *Merryweather* holding, the majority of American courts have long flatly said there can be no contribution between joint or concurrent tort-feasors, without distinguishing between those who are intentional wrongdoers and those whose unpurposed negligence results in a tort.
>
> Widespread revulsion against that rule, which Chief Justice Groner said "is not sustainable upon any fair basis of reasoning, is wrong, and should be overruled," was demonstrated when the legislatures of some fifteen States enacted alleviating statutes in one form or another. Dissatisfaction with the rule is further shown by the fact that many courts have "riddled it with exceptions." [Footnotes omitted.]

An article on contribution in the Cornell Law Journal also addresses *Merryweather:*

> This view [against contribution] however, has been slow to take hold on American jurisdictions, many of which apply the rule [of contribution] equally to intentional and unintentional tort-feasors . . . The basis of the rule, to the extent that a rational basis exists, lies in the maxim that "no man can make his own misconduct the ground for an action in his own favor . . . The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it." [Citations omitted]. "Contribution in Private Antitrust Suits," 63 Cornell Law Review 1978 at 682.

[5] In addition, an English law which is a counterpart to one of our antitrust laws, the Restrictive Practice Trade Act, 1976, c. 34, allows a party who is aggrieved by an unregistered restrictive action (agreement in restraint of trade or any other anticompetitive action) to bring an action for violation of the statute. Such a violation is technically a breach of a statutory duty, which in English law would have its own statutory remedy. This statute is a "hybrid" offense which characterizes the breach of the statute as "statutory negligence," creating a tort. As long as a statute gives a party a civil tort remedy, the 1935 act applies, and contribution is allowed whether or not the violation is intentional.

As described more fully below, the trend towards permitting contribution actions brought in both state and federal courts has resulted from the realization that "a more equal distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974). Courts adopting contribution have characterized it as a "rule of reasoned fairness," and indicated that "there is no longer a legitimate place in our system, if indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss." *Gomes* v. *Brodhurst*, 394 F.2d 465, 467 (3rd cir. 1967). Other courts have explained rejection of the rule in even stronger terms, stating that the reasons for it have been "overborne by recognition of possible collusion between settling defendants and plaintiffs and the realization that fundamental fairness demands a sharing by wrongdoers in setting the wrong right." *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978).

Equally important, courts have recognized that the goal of deterrence will be better achieved by ensuring more comprehensive inclusion of defendants, including intentional tortfeasors. As the Supreme Court said in a recent admiralty case, "[t]he interests of safety dictate that where two parties 'are both in fault, they should bear the damage equally, to make them more careful,' " *Cooper Stevedring supra.* at 111.

Federal courts have evolved a contribution rule more reasonable than *Merryweather* in many situations. In *George's Radio Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942), the court refined the *Merryweather* rule so that it applied in cases where "the parties are not intentional and willful wrongdoers, but are made so by legal inference or intendment." *Id.* at 223. The court in this case did not feel compelled to follow the controlling State law and allowed contribution.

Congress has already enacted a number of provisions permitting claims for contribution among joint wrongdoers who have violated the Securities Act of 1933 (*see* 15 U.S.C. § 77K(f)) or the Securities Exchange Act of 1934 (*see* 15 U.S.C. §§ 78i(e) and 78r(b)), even where intentional misconduct is shown. Congressional recognition of contribution in that field thus dates back nearly 50 years.

While the Supreme Court, through *Texas Industries*, *supra*, has ruled that a system of contribution in antitrust cases must also be legislated, the committee notes that the federal courts have provided for contribution in certain substantial areas of federal law, such as securities, absent statutory authorization.

In *de Hass* v. *Empire Petroleum*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd* in part, *rev'd* in part on other grounds, 453 F.2d 1223 (10th cir. 1977), a securities case, the court allowed contribution among intentional wrongdoers although the statute did not specifically provide for it. Thereby, the court expressed the opinion that there was a policy that contribution was part of the regulatory framework of the securities laws, whether or not specifically stated in the statute and that contribution should be extended to intentional tortfeasors.

In *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2nd cir) *cert. denied*, 404 U.S. 941 (1971), another securities case, the court used the *de Hass* case, *supra*, to support the notion that the common law against contribution among joint intentional tort-feasors had changed, reasoning that to allow an intentionally guilty defendant to escape its fair share of the liability would actually dilute the deterrent effect of the laws.

In a third securities case, the court in *Gould* v. *American-Hawaiian Steamship Co.*, 387 F. Supp. 163, 169 (D. Del. 1974) cited *de Hass* and several other cases in support of the proposition that:

> unlike indemnity, contribution would not interfere with the regulatory purpose of § 14 of the 1934 Act. On the contrary, the availability of contribution would tend to insure that all individuals jointly liable for a violation of § 14(a) would have some responsibility for damages. . . Were contribution not available, those found liable for breach of a statutory obligation might escape liability as effectively as if they were entitled to indemnity. 387 F. Supp. at 163.[6]

As previously noted, three circuit courts examined the issue of contribution in antitrust actions prior to the *Texas Industries* decision. Because *Texas Industries* declined to examine the questions raised by contribution on the merits, it is instructive to examine these lower court opinions. In holding that contribution was available, the court in *Professional Beauty Supply*, *supra*, indicated that the deciding factor was "fairness between the parties." 594 F.2d at 1185. The court stressed the effect of contribution on deterrence as well, however, noting that "to deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in antitrust violation could escape all responsibility for its wrongdoing." *Id.* at 1185.

In fashioning a contribution rule for the Eighth Circuit, the court, citing the "deterrent policy of the antitrust laws," extended the right of contribution to intentional antitrust violations, to assure "that other tortfeasors will not escape liability." *Id.* at 1186.

Both the *Olson Farms* and *Abraham Construction* courts, while recognizing the arguments on both sides of the issue, declined to fashion contribution rules, with the *Olson* court finding that "the Congress . . . is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation." *Olson*, supra at 79,704.

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[6] The federal courts have recognized the fairness of the right to contribution in other areas of law and have acted to permit such claims. *See, e.g., Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra* (admiralty); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951) (federal tort claim); *Kohr* v. *Allegheny Airlines, Inc.* 504 F.2d 400 (7th Cir. 1974) *cert. denied*, 421 U.S. 978 (1975) (aviation law).

3. STATE CONTRIBUTION STATUTES

The following 19 States have passed statutes permitting contribution patterned after the Uniform Contribution Among Joint Tortfeasors Act (12 U.L.A. 36) (1979 Supp. 1975 ed.).

State	Statutory citation	Date approved
Rhode Island	R. I. Gen. Laws Sections 10-6-1—10-6-11	1940
Arkansas	Ark. Stat. Ann. Sections 34-1001—10-1009	1941
Hawaii	Haw. Rev. Stat. Sections 663-11—663-17	1941
Maryland	Md. Ann. Code Art. 50, Sections 17-24	1941
South Dakota	S. D. Comp. Laws Ann. Sections 15-8-11—15-8-22	1945
New Mexico	N.M. Stat. Ann. Sections 24-1-11—24-1-18 (replaced by N.M. Stat. Ann. 1978 Sections 41-3-1—41-31-8).	1947
Delaware	Del. Code tit. 10, Sections 6301-6308	1949
Pennsylvania	Penn. Stat. Ann. tit. 12, Sections 2082-2089 (replaced, 1978, and reenacted in 42 Pa. Con. Stat. Ann. Sections 8321-8327).	1951
Mississippi	Miss. Code Ann. Section 85-5-5	1952
New Jersey	N.J. Stat. Ann. Section 2A:53A:1-2A-53A-5	1952
North Dakota	N.D. Cent. Code Sections 32-38-01—32-38-04	1957
Massachusetts	Mass. Gen. Laws Ann. ch. 231B, Section 1-4	1962
North Carolina	N.C. Gen. Stat. Sections 8-1-1B-6	1968
Tennessee	Tenn. Code Ann. Sections 23-3101-23-3106	1968
Alaska	Alaska Stat. Section 09.16.010-09.16.060	1870
Nevada	Nev. Rev. Stat. Section 17.215-17.325	1973
Florida	Fla. Stat. Ann. Section 768.31 (West)	1975
Colorado	C.R.S. 1973, Sections 13-50, 5-101—13-50, 5-106	1977
Wyoming	S.C. Sections 1-1-110—1-1-113	1978

The following 18 States have enacted other versions of legislation abandoning the common law rule against contribution among joint tortfeasors.

State	Statutory citation	Date approved
Louisiana	La. Civ. Prac. Ann. Arts. 1111-1116	1954
West Virginia	W. Va. Code Ann. Section 55-7-13	1958
Vermont	Vt. Stat. Ann. tit. 12, Section 1036	1970
New Hampshire	N.H. Rev. State. Ann. Section 507:7B	1971
Kentucky	Ky. Rev. Stat. Section 412-030	1973
Texas	Tex. Civ. Code Ann. Art. 2212a, Section 2b	1973
Utah	Utah Code Ann. Section 78-27-39	1973
Wisconsin	Wisc. Stat. Ann. Sections 113.01-113.10	1973
Kansas	Kan. Stat. Ann. Section 60-258(a)	1974
Michigan	Michigan Stat. Ann. Section 600.2925	1974
New York	N.Y. Civ. Prac. Section 1401 (McKinney)	1974
Georgia	Ga. Code Ann. Sections 105-2011—105-2012	1977
Idaho	Idaho Code Section 6-803(1)	1977
Minnesota	Minn. Stat. Ann. Section 604.01	1977
Missouri	Mo. Stat. Ann. Section 537.060	1977
Montana	Mon. Code Ann. 1978 27-1-707	1977
Virginia	Va. Code Section 8-01-34	1977
California	Cal. Civ. Proc. Section 875 (Deering)	1978

The following are States whose statutes are silent on the issue of whether or not contribution applies when the tort is intentional: Rhode Island, Arkansas, Hawaii, Maryland, South Dakota, New Mexico, Delaware, Pennsylvania, Mississippi, Massachusetts, Louisiana, West Virginia, Utah, Wisconsin, Michigan, Idaho and Missouri. New York specifically allows contribution for intentional tortfeasors. It would

appear that in the absence of any express provision barring application in the case of intentional tortfeasors, the statutes do apply to intentional torts.

III. Text of Senate Bill 995

The text of S. 995 is as follows:

A BILL To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"Sec. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

IV. Committee Action

The committee conducted four days of hearings on S. 995: April 22, May 11, and December 7, 1981, and February 10, 1982. S. 995 was reported out of the committee on March 31, 1982 by roll call vote, as follows:

YEAS (12)	NAYS (6)
Thurmond	Dole
Mathias	East
Laxalt	Specter
Hatch	Biden
Simpson	Kennedy
Grassley	Metzenbaum
Denton	
Byrd	
DeConcini	
Leahy	
Baucus	
Heflin	

Prior to final passage, Senators Thurmond, Laxalt and Hatch offered the following amendment to S. 995:

Strike out all after the second word in the text of the bill and insert in lieu thereof the following:

"Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"Sec. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or convenant, entered into in good faith, re-

lieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply to all actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.

"(f)(1) The claim reduction principle of subsection (b) of this section shall also apply to actions alleging an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act which are pending on the date of enactment of this section, if upon proof by any party subject to liability for damages in such an action, the court determines that it would be inequitable, in light of all the circumstances and notwithstanding subsection (f)(2), not to apply the principle in that action. In ruling on a request to apply claim reduction, the court shall find the facts specially.

"(f)(2) No agreement to settle, compromise, or release a claim under section 4, 4A, or 4C of this Act which has been signed by the parties prior to the date of enactment of this section may be rescinded, disapproved, reformed, or modified by the parties or by the court because of the application of the claim reduction principle, except upon the written consent of all the parties thereto.

"(g) Each subsection of this section is severable from all other subsections, and the invalidity of any subsection for any reason shall not affect the validity of the remaining subsections: Provided, That subsections (f)(1) and (f)(2) are not severable from each other, and the invalidity of any provision of those subsections as applied in an action shall render the remainder of those subsections inapplicable in that action."

At the request of Senator Denton, Chairman Thurmond then introduced an amendment to the Thurmond—Laxalt—Hatch amendment, as follows:

Strike out subsections (e), (f), and (g) and insert in lieu thereof the following:

"(e) This section shall apply only to actions under section 4, 4A or 4C of this Act commenced after March 31, 1982.

"(f) This section is intended to establish specific statutory rights pursuant to the terms and conditions set forth herein. Nothing in this section shall affect any rights which parties to cases pending on March 31, 1982 may have had under existing law prior to that date."

This amendment to the Thurmond—Laxalt—Hatch amendment was defeated by roll call vote, as follows:

YEAS (6)	NAYS (11)	PRESENT
Dole	Thurmond	Heflin
Denton	Mathias	
Kennedy	Laxalt	
Metzenbaum	Hatch	
Leahy	Simpson	
Baucus	East	
	Grassley	
	Specter	
	Biden	
	Byrd	
	DeConcini	

Senator Baucus then offered an amendment to the Thurmond-Laxalt-Hatch amendment, as follows:

Strike out subsections (e), (f), and (g) and insert in lieu thereof the following:

> "(e) This section shall apply only to actions under section 4, 4A or 4C of this Act commenced after the date of enactment of this section.
>
> "(f) This section is intended to establish specific statutory rights pursuant to the terms and conditions set forth herein. Nothing in this section shall affect any rights which parties to cases pending on the date of enactment of this section may have had under existing law prior to that date."

This amendment to the Thurmond-Laxalt-Hatch amendment was defeated by roll call vote, as follows:

YEAS (6)	NAYS (10)	PRESENT (2)
Dole	Thurmond	Specter
East	Mathias	Heflin
Kennedy	Laxalt	
Metzenbaum	Hatch	
Leahy	Simpson	
Baucus	Grassley	
	Denton	
	Biden	
	Byrd	
	DeConcini	

The Thurmond-Laxalt-Hatch amendment then passed by roll call vote, as follows:

YEAS (10)	NAYS (7)
Thurmond	Dole
Mathias	East
Laxalt	Grassley
Hatch	Specter
Simpson	Kennedy
Denton	Metzenbaum
Biden	Baucus
Byrd	
DeConcini	
Heflin	

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V. Summary of Reported Bill

S. 995 adds a new section, 4I, to the Clayton Act. Subsection (a) provides that any parties subject to liability as defendants in antitrust price-fixing cases under sections 4, 4A or 4C of the Clayton Act may claim contribution from their co-conspirators. The formula for computing each defendant's share of the liability for damages is based upon the sales or purchases of goods or services of such defendant. The liability is therefore based on an assessment of the damages attributable to each defendant's specific relative benefit from the price-fixed sales weighted by the amount of the overcharge as reflected in its individual sales or purchases. Subsection (a) makes clear that a defendant in a price-fixing suit may use the procedural tools of the Federal Rules of Civil Procedure to effectuate its right of contribution in asserting a cross-claim, counterclaim, third party claim or by a separate action, whether or not any other party has brought an action for contribution in the suit. The intent is to retain the policies of both Rule 14(a) of the Federal Rules of Civil Procedure, which encourages joinder of claims and parties in one proceeding, and Rule 42(b), which permits the court to order separate trials on the contribution issue to avoid undue prejudice to a plaintiff.

Subsection (b) describes the "carve-out" formula by which the court relieves nonsettling defendants of the liability attributable to the sales or purchases of the defendants who settle. In order to effectuate the goal of equitable distribution of the liability among the alleged co-conspirators, the court is instructed to subtract from the claims of the releasor against the non-settling defendants the greatest of the following three sums: (1) any amount stipulated by the release or covenant given; (2) the amount of consideration paid for the release or covenant; or (3) treble the actual damages attributable to the settling defendants' sales or purchases of goods or services. This provision also specifies that in single damage cases by the U.S. Government under section 4A, the amount "carved-out" under item 3 above is not trebled.

Subsection (c) provides that a defendant who settles is protected against any liability for contribution with respect to the damage claims of the plaintiffs with whom such defendant settles. This protection becomes effective as soon as the settlement agreement is entered into, but the protection lapses if the agreement is not consummated. Subsections (b) and (c) thus provide together that a settling party is not subject to claims for contribution from nonsettling parties and that nonsettling parties are not liable for damages attributable to the settling parties.

Subsection (d) emphasizes that the principles of joint and several liability continue to apply to price-fixing suits. That is to say, the plaintiffs' burdens are not increased. They need still sue only one defendant and collect damages attributable to all (although, of course, that defendant has a claim against the other defendants for contribution). Moreover, the fact that one defendant is insolvent or outside the jurisdiction of the court does not impair the plaintiffs' rights, although it may adversely affect the defendants' ability to obtain contribution.

Subsection (e) provides that application of this Act will be prospective from the date of enactment. The effect of subsection (e) is that application of the contribution provision of S. 995 [subsection (a)] will be prospective from the date of enactment.

Subsection (f) gives the court the authority to apply the claim reduction provision of the bill (subsection (b)) in a pending case. Subsection (f)(1) provides that if, upon proof offered by any party subject to liability for damages, the court finds it would be inequitable not to do so, the court shall apply claim reduction in any particular case.

Subsection (f)(2) prohibits the court from overturning settlements which have already been concluded in a pending case. Thus, the application of the claim reduction principle cannot be construed to rescind, disapprove, reform or modify any settlement agreement signed prior to date of enactment.

Subsection (g) provides that if for any reason any subsection of the Act is found to be invalid, it shall be severed from the remainder of the Act. In this regard, it is specifically set forth that subsections (f)(1) and (f)(2) are not severable from each other.

VI. Discussion of the Major Issues

It is the view of the committee that when businesses are placed in a position potentially harmful to their continued growth and participation in the marketplace, competition suffers, and there must be a reevaluation of the system which achieves this result. Under the principles of contribution and claim reduction set forth in S. 995, any defendant in a price-fixing action would be assured that it was responsible only for treble the actual damages attributable to it; that unnamed, but culpable co-conspirators would not escape liability automatically simply because the plaintiff chose not to sue them; and that should it choose to test the plaintiff's allegations at trial, it will not be ultimately responsible for the damages attributable to co-defendants who have settled.

The concepts of contribution and claim reduction have, over the past few years, been the subject of considerable scrutiny. In addition to the hearings conducted by the committee both in this Congress and the Ninety-Sixth Congress,[7] numerous scholarly works have been written on the topic.[8]

Analysis of all these materials under consideration by the committee suggests five major concerns regarding the effects of S. 995 that must be addressed: (1) deterrence; (2) settlement; (3) increased complication of litigation and control of the lawsuit; (4) the propriety of contribution and claim reduction in price-fixing cases; and (5) application of claim reduction in pending cases.

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[7] See hearings before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary, 96th Cong., 1st sess., Serial No. 96-27.

[8] See, e.g., Cirace, A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits, 55 St. John's L. Rev. 42 (1980); Easterbrook, Landes & Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331 (1980); Floyd, Contribution Among Antitrust Violators: A Question of Legal Process, 1980 B.Y.U.L. Rev. 183; Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981); Sullivan, New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution, 1980 U. Ill. L. Forum 389.

1. DETERRENCE

Under the rule of joint and several liability, each defendant in a price-fixing damage suit is liable not only for damages attributable to its own conduct, but those attributable to the conduct of all co-conspirators as well. Insofar as an antitrust plaintiff being able to sue one defendant and recover damages caused by it and numerous other unnamed co-conspirators, S. 995 would not change the principle of joint and several liability. What would change, however, is the current ability of a co-conspirator completely to avoid liability for its acts, should the plaintiff elect not to sue that particular co-conspirator.

Those who believe contribution and claim reduction will actually increase deterrence argue that it will help ensure that all participants in a price-fixing conspiracy are held accountable for at least some damages, either by the plaintiff or by another co-conspirator. On the other hand, the argument is made that contribution would decrease deterrence because it would eliminate the threat that each co-conspirator could be held liable for treble damages caused by all conspirators in a given case.

It is the opinion of the committee that S. 995, which sets forth a contribution formula assessing the liability of each alleged joint tort-feasor based on damages attributable to its sales or purchases, would strengthen deterrence. The Honorable Griffin Bell, former Attorney General of the United States, addressed the question of deterrence during his testimony before the committee on April 22, 1981. Judge Bell disagreed that contribution would reduce deterrence, noting that "treble damages based on a defendant's own market share afford a sufficient deterrent to price-fixing," and further, that "the best deterrent to price-fixing is vigorous criminal prosecutions by the Antitrust Division of the Justice Department." [9] Testifying on behalf of the Trade Regulation Committee of the Association of the Bar of the City of New York, Robert Joffe, Esq. also testified about the deterrent effect of S. 995:

> . . . S. 995 does not weaken the principle of joint and several liability in any way that prejudices a plaintiff's flexibility in bringing suit against one or several of the total number of defendants. Rather, S. 995 simply permits those defendants who are subject to liability for damages on the basis of joint and several liability to enforce contribution rights against their co-conspirators. The [Trade Regulation] Committee does not believe that such legislation will remove a significant deterrent to price-fixing.
>
> First, the committee knows of no empirical evidence that businessmen, including the most sophisticated, factor the possibility of liability for an entire industry's actions falling on one firm's shoulders into any decision-making process.
>
> Second, treble damages even for the injury caused by a single factor in a price-fixing conspiracy is a very substantial deterrent. When coupled with what the committee believes

[9] See, in this regard, Renfrew, The Paper Label Sentences: An Evaluation, 76 Yale L.J. 610 (1977), and Baker and Reeves: The Paper Label Sentences: A Critique, Id, at 621, for an evaluation of the unique deterrent effect of criminal fines and sentences in price-fixing cases. Baker and Reeves conclude that the most effective deterrent is prison sentences for corporate executives involved in antitrust violations.

> is the more frightening possibility of jail sentences and massive criminal fines, simple treble damage exposure ought to be sufficient to deter price-fixing in those cases where it can be deterred. The problem often is that those who fix prices—middle managers—are not those who have to pay the damages—the corporation. That is what criminal sanctions are for. Greater civil damages are unavailing.
>
> In this respect, a system that allows some to escape liability entirely, or on the basis of "cut-rate" settlements, may in fact encourage some to believe that they will get off cheaply, whereas a system such as that set up by S. 995 would at least make more certain the threat that one may well be liable in actions to enforce contribution rights for those treble damages traceable to one's wrongful acts.

The Honorable William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, also addressed the question of deterrence when he appeared before the committee on April 22. While noting that contribution might be argued to assist deterrence to the extent that it helps ensure that a co-conspirator will be called to account by another co-conspirator (if not a price-fixing victim), Mr. Baxter also pointed out that a no-contribution rule "poses for each co-conspirator the risk of liability for all the conspiracy's damages times three." Balancing the effects of contribution versus no-contribution, Mr. Baxter further testified:

> Obviously, one cannot be definitive in predicting which of these effects would be stronger in a given instance. However, to the extent that firms are risk averse—a proposition that produces endless debate among scholars—a rule denying contribution and claim reduction should have the greater deterrent effect. Risk averse firms should be more deterred by the possibility of paying an incalculably large damage award than by an increased likelihood of having to satisfy a more modest claim. Thus, I believe that in cases in which the social desirability of deterrence cannot be doubted—cases involving clear, horizontal cartel-type violations—ultimate liability deterrence considerations generally argue for a no-contribution rule.
>
> It is bad enough that one cannot be definitive in predicting the ultimate liability deterrent effects of contribution in a given instance. Unfortunately, calculating the possible effects of contribution and claim reduction on deterrence is even more complex, due to even more subtle and debatable effects on the dynamics of litigation and settlement.[10]

In his article "New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution," *supra*, Professor Sullivan succinctly summarizes the deterrence benefits of establishing a system of contribution:

[10] In *Texas Industries supra*, the Court similarly noted the debate over the concept of risk aversion, stating that "Economists disagree over whether business decisionmakers, be they the high-level or the middle-level management, are 'risk averse'; *i.e.*, they would prefer a greater certainty of a small loss to a less certain chance of a greater loss." [Citations omitted.] *Id.* at 2065.

> The argument that contribution dilutes the deterrent effects of treble damages has been central to the reasoning of those courts which have declined to adopt an antitrust contribution rule. By eliminating the possibility that one wrongdoer will bear the total liability, these cases assert, contribution reduces deterrence. The counter argument, however, that contribution increases deterrence by preventing influential violators from avoiding litigation, is more persuasive. While a no-contribution rule may increase deterrence with regard to a single wrongdoer by precluding a distribution of the loss, contribution ensures that a larger number of violators are ultimately subject to liability. Contribution thus maximizes the deterrence goal of certainty of punishment. Moreover, considerations of fairness dictate that less culpable wrongdoers should not satisfy the entire liability merely because of a "plaintiff's whim or spite, or his collusion with the other wrongdoer." By permitting contribution rather than a shifting of the entire loss through indemnification, courts would strengthen the law's deterrent-based policy, while at the same time eliminate the unfairness which results from a *per se* prohibition against contribution. [Citations omitted] *Id.*, at 412.

The committee agrees with the conclusions reached by Professor Sullivan. Further, the committee is mindful of the danger of overdeterrence raised by the denial of a right of contribution. The undesirability of such a result has been recognized by the Supreme Court. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), in the context of its rejection of strict criminal liability in antitrust cases, the Court pointed out:

> [There exists] the distinct possibility of overdeterrence; salutary and pro-competitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error of judgment. *Id.* at 441.

Just as the possibility of criminal punishment may dissuade a businessman from a legitimate and, indeed, beneficial course of conduct, so too may the potential for tremendous civil liability under a no-contribution rule.

2. EFFECT ON SETTLEMENT

The argument has been advanced that S. 995 will undermine the settlement process and lead to even more protracted antitrust litigation. The committee rejects this conclusion, and finds that the effect of S. 995 would simply be to lessen the possibility of coercive settlements. As a matter of policy, it is necessary to balance the desirability of terminating antitrust cases as rapidly as possible with the right of defendants to utilize the courts to assert their innocence. Antitrust defendants should not be denied the opportunity to present their case because of fear of liability for damages caused by other defendants who have settled. Testifying on the problem of coerced settlements in large antitrust cases, former Attorney General Bell noted:

> If you represent someone who gets caught up in one of these monstrous suits, and they will tell you all day that they are innocent, you have to finally say to them that there is joint liability and that damages could be a billion dollars. We will say this company is worth $50 million, and they are offering to let you buy out for a million dollars. What are you going to tell your client? To pay. They pay it, and then they are bitter. I know this happens. Every time you see some of these clients they are still grumbling about our system of law that put them in that predicament.

During the committee's hearing on S. 995 on April 22, two witnesses presented testimony which substantiated Judge Bell's comments. Mr. George Kress, Chairman of the Board of Green Bay Packaging, Inc., and Mr. Richard Johnson, Chief Executive Officer of the Menasha Corporation, related the experience of their companies in the massive *Corrugated Container* litigation.

Mr. Kress noted that at the conclusion of the Justice Department's investigation of the corrugated container industry, 14 corporations and numerous individuals were indicted for felony or misdemeanor violations of the antitrust laws; neither Green Bay nor any of its employees were charged. However, Mr. Kress noted that less than a year following the government's investigation, Green Bay was named as a co-defendant in more than 25 class action lawsuits brought against 39 corporations in the industry.

Green Bay's initial reaction to being named as a defendant in these cases was not one of alarm. As Mr. Kress testified:

> Our management didn't feel overly concerned by these actions, for having been found not to be involved in the conspiracy alleged by the Justice Department, and finding none of its past customers named as a complaining plaintiff in the treble damage class action lawsuits, we concluded our only concern was to prepare to bear the expense of lengthy litigation to prove our innocence in these civil actions. Developments proved this to be a very erroneous conclusion.
>
> Shortly after the filing of the many civil actions, and prior to the commencement of the criminal trial, some of the indicted defendants in the criminal suit settled the civil actions with the plaintiffs. This settling trend ignited a five week "settlement stampede" resulting in many of the defendants entering into settlement agreements with the plaintiffs in the class actions.

Finding that approximately 80 percent of the defendants had settled at a cost of over $250 million and that the dollar amount per market share percentage point had risen steadily with each settlement, Green Bay found itself facing a settlement offer of $3,700,000 per percentage point (total settlement $5.5 million). The first defendant to settle paid only $500,000 per point, or 7.5 times less than that offered Green Bay.

Mr. Kress continued:

> Green Bay thereby realized that it faced a monumental decision—pay the $5.5 million settlement, or face the finan-

> cial risk that it may ultimately be the only remaining defendant who, under the existing law, would be jointly and severally liable for the entire amount of damages which may be allowed by a jury for the alleged price-fixing conspiracy. The absence of a right of contribution and claim reduction therefore served to coerce us into a settling posture.
>
> An estimate of the potential damages which might be decided by a court was then necessary in order that a proper assessment of the situation be made.
>
> Using a variety of assumptions in order to arrive at a feasible damage figure which might ultimately be determined by a jury, we assumed that a damage figure of 5 percent of the total industry annual sales was feasible. Subtracting the settlements already made, and multiplying the results by 2½ times after taxes, we concluded that we must stand ready to bear the burden of a potential legal liability of from 2 to 5 billion dollars if we followed our original decision to defend our innocence of any civil antitrust liability.

Noting that this contingent liability of over $2 billion would have to be reported to Green Bay's mortgage holders and potential lenders, thus voiding the company's borrowing power, Mr. Kress testified that Green Bay "reluctantly concluded a settlement agreement. . . ." He noted:

> [L]oss of borrowing power is the killing factor for a small, privately owned corporation involved in a capital intensive industry. A small business such as ours must borrow in order to compete. With a net worth of $70 million, our then current borrowing was in excess of $50 million.

Mr. Kress concluded his testimony by noting the outcome of both the *Corrugated Container* criminal prosecution and civil damage trials:

> 1. The criminal antitrust trial resulted in a verdict of not guilty for all defendants who stood trial.
>
> 2. In the civil action, the jury, after hearing all the evidence in a three month long trial was asked by the judge to respond to a special verdict specific question: "Was Green Bay Packaging, Inc. a member of a combination or conspiracy to fix, raise, maintain or stabilize prices of corrugated containers throughout the United States?" The jury's response was: *NO.*[11]

Mr. Johnson, Chief Executive Officer of the Menasha Corporation, reported an experience in the *Corrugated Container* litigation similar to that of Green Bay. Neither Menasha nor any of its employees were indicted, yet it found itself as a defendant in the same civil antitrust damages suits as did Green Bay. As to the merits of either settling the cases or going to trial, Mr. Johnson testified:

> When counsel informed us that we could, because of no contribution, be hurt badly regardless of culpability or size of our sales to this industry, we became alarmed.

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[11] The only defendant to go on trial in the civil case in lieu of settling, the Mead Corporation, was found to have violated the antitrust laws but the amount of damages has not yet been determined. Mead was acquitted in the related criminal case.

In our calculations, it was evident that if Menasha Corporation were to litigate along with the other defendants and if a conspiracy were found and Menasha were determined to be collectable by the plaintiffs, the company would be assessed damages in excess of $1 billion, we would be bankrupt and our shareholders would have nothing from the fruits of their and their ancestor's work. With that warning from our counsel, we consulted with our directors and several of the major shareholders to ask their advice and permission to accomplish a settlement.

Further, we saw some companies which have not been as conservatively managed seeking special treatment due to their poverty and in two cases this was recognized and allowed by the plaintiffs and thus additional potential burden was placed upon the more soundly financed companies. We also saw the rash of settlements that ensued and the constant threat by the plaintiffs that unless settlement is made now the price would escalate at the next settlement opportunity. We had little or no information concerning the fact or fiction that had been presented at the Grand Jury concerning us, or any other company which had been subpoenaed; that is, we did not know how strong or weak a case the plaintiffs would have against any of the companies. We were completely in the dark. We could not afford the huge costs of litigating an action of this nature, nor could we bear the risk of not having each party pay their rightful share of an alleged conspiracy, whether actual or imagined.

With no consideration of merits, Menasha Corporation was given the opportunity by the plaintiffs to settle on a "take it or leave it" basis. We chose to settle and paid $2,750,000 per point and having sold 1.68 percent of the market, we paid a total of $4,600,000. Further, we have to date incurred legal expenses of $651,000 and spent untold hours of executive and staff time. Menasha was found in a civil case not to be a member of the conspiracy. We and all other settling defendants paid a huge insurance premium. There is $300,000,000 in this pool. We did it to save us from possible bankruptcy.

These are precisely the type of situations S. 995 is designed to address. As among named defendants in an antitrust damages case, the claim reduction provision of S. 995 would assure that, unlike the predicaments of Green Bay and Menasha, non-settling defendants do not face liability for damages caused by settling defendants' damages "left behind" because of low settlement amounts. Under claim reduction, such low settlements would be discouraged, since they would reduce significantly the total liability of all defendants to the plaintiffs; the amount subtracted from the total liability would be in excess of the amount paid in settlement by the settling defendant.

Commenting on the function of the claim reduction provisions of S. 995, Judge Bell testified:

> . . . certainly, in any settlement the plaintiff accepts less than his claim against the defendant, in exchange for elimination of the risk that at trial the jury will return a defend-

> ant's verdict. And to the extent that the plaintiffs in a price-fixing case accept in settlement less than the treble damages attributable to the settling defendant, then their total claim against all defendants would be reduced. But this is inherent in the nature of compromise. In exchange for accepting a lesser amount in settlement, the plaintiffs avoid the risk that they might eventually receive nothing at all.

Assistant Attorney General Baxter told the committee that while claim reduction reduces the settlement "snowball" effect, he felt it might inhibit settlement. Noting that with each settlement a plaintiff gives up the chance to recover the settling defendant's contribution share of total damages, Mr. Baxter stated that if a plaintiff cannot calculate the share, it may shun settlements because of the risk of giving up an unknowable proportion of its claim. However, in response to a question posed about the difficulty of ascertaining the damages specifically attributable to settling defendants, Mr. Joffe, representing the New York City Bar, stated that plaintiffs should have no difficulty in determining specific damages. Mr. Joffe noted that:

> [S]ales of each defendant are well known. They have computerized records. Even if the plaintiffs do not know from whom they bought or what the total volume of sales is, the defendants know and that is readily ascertainable.
>
> The only question which remains is the amount of the over charges on each defendant's sales. That usually is estimated and could be estimated here. It does not seem to me any greater difficulties are presented in the settlement context under this bill that would exist without it. I do not think any additional calculation has to be made under the bill than without it.

While Mr. Baxter noted that, all in all, claim reduction would be likely to inhibit settlements, he noted:

> a dampening effect on settlements is not entirely without its blessings; to the extent that diminished prospects for a quick settlement discourage the filing of totally nonmeritorious cases, so much the better.
>
> In fact, I suspect that damage cases with merit would continue to be brought under a claim reduction rule, notwithstanding the sorts of problems that we have been discussing.

In urging the enactment of S. 995, it is not the committee's intention to impair in any way either the bringing of meritorious antitrust damage suits or create roadblocks for the reasonable and speedy settlement of such suits. Rather, S. 995 seeks, among other things, to guard against coercion of defendants into unwarranted settlements, thus removing what many have seen as a major obstacle to the exercise of a defendant's right to defend itself against price-fixing charges filed against it.

3. CONTROL OF SUIT; COMPLICATION OF LITIGATION

Opponents of S. 995 have raised the objection that the bill will have the effect of greatly increasing the complexity of already complex antitrust litigation and that further, the process of determining the appropriate contribution and/or claim reduction among the guilty parties will cause plaintiffs to lose control of their lawsuits. The committee is of the opinion that neither criticism is sufficiently justified to create significant problems should S. 995 become law.

Rule 42(b) of the Federal Rules of Civil Procedure empowers trial judges to organize a lawsuit to serve the purposes of efficiency as defined by the equities. It provides

> Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Having ordered separate trials under this rule, the court may limit discovery to the segregated issues. Separated claims and parties thus need not confuse or complicate the trial. *See Ford Motor Co. v. Milby*, 210 F.2d 137, 139 (4th Cir. 1954). Moreover, under Rule 54 (b), the original plaintiff can obtain a final judgment on his claim even if separate claims for contribution are still pending. The issue of claim reduction should be resolved at the earliest practicable time in the course of litigation.

The dissent in *Abraham Construction*, *supra*, noted the need for minimizing the additional complexity contribution could bring to a plaintiff's case, and recognized the ability of the trial court to keep it under control:

> The district courts are certainly aware of the antitrust plaintiff's status as a private attorney general and of the important role played by the private damage action in enforcing the objectives of the antitrust laws. The special solicitude accorded these plaintiffs necessarily requires a liberal exercise of the separate trials provision. Realizing his favored position, the antitrust plaintiff is not likely to assume that the trial judge would deny separation and allow defendant to complicate the lawsuit or otherwise add to the private litigant's burden. Hence, the incentive to sue provided by the treble damages action is not jeopardized if contribution is allowed. 604 F.2d at 908.

Thus, given the wide latitude afforded by the Federal Rules of Civil Procedure for control of litigation, it is the opinion of the committee that it is unlikely antitrust plaintiffs will be faced with the

prospect of losing control of their case, or that contribution will overly complicate antitrust litigation.

4. PROPRIETY OF CONTRIBUTION AND CLAIM REDUCTION IN PRICE-FIXING CASES

S. 995 applies only to price-fixing cases. During committee hearings on the bill the question was raised whether it was proper to apply contribution and claim reduction in what has been characterized as an intentional tort. Several witnesses addressed this point.

The Hon. Charles Renfrew, formerly Deputy Attorney General of the United States and federal district court judge for the Northern District of California, in his prepared testimony for the committee, observed:

> . . . refusal to permit contribution may allow a willful and intentional tortfeasor to escape without any liability whatsoever simply because the plaintiff has sued someone else. Most antitrust cases do not involve intentional behavior in the usual sense of the word, but most significantly, even in price-fixing cases there may not have been an intentional violation of the law.

Citing *United States* v. *United States Gypsum Co.*, supra, Judge Renfrow went on to note that:

> . . . the Supreme Court made it clear that intent was only necessary to establish a criminal violation of the antitrust laws. There could be a civil violation of the antitrust laws by showing anticompetitive effect; you need not also show anticompetitive purpose.

Testifying on behalf of the Section of Antitrust Law of the American Bar Association, Robert Taylor, Esq., concurred in the judgment of Judge Renfrew:

> There are, of course, a few antitrust cases which involve intentional torts, as that term has developed at common law. I question, however, whether even these should always be denied contribution. The trend of the law in general tort litigation is away from drawing such a distinction between intentional and nonintentional torts. In that sense, I think that history is refuting those who would draw the distinction in antitrust cases.
>
> More importantly, however, there are many, many antitrust cases that, although they may be characterized by some as intentional torts, are not intentional in any meaningful sense. Judge Renfrew pointed out a few minutes ago that the U.S. Supreme Court in the *Gypsum* litigation makes very clear that intent is not an element for recovery in a civil case. The case law demonstrates numerous occasions on which a company was held accountable for conduct that it thought lawful.
>
> Moreover, I have serious difficulty with the concept of intent when it is superimposed upon concepts of vicarious liability. We hold a corporate defendant liable under the antitrust laws even though that corporate defendant may have had a strong

policy in favor of antitrust compliance and even though an individual employee may have been violating the compliance policy as much as he was violating the law. Whatever may be the wisdom of a rule of strict liability in such a case, it is not an intentional tort in any meaningful sense.[12]

The committee agrees with the conclusions reached by these expert witnesses. One of the most essential functions of this legislation is to prevent wrongdoers from evading responsibility for their wrongful acts. The law currently permits such evasion.

5. APPLICABILITY OF CLAIM REDUCTION TO PENDING CASES

On February 10, 1982 the committee conducted a hearing on the specific question of whether S. 995 should apply to pending cases. As originally drafted, Section (e) of the bill provided that it would apply only to cases filed after the date of enactment. Sixteen witnesses were called to testify, who submitted several hundred pages of written testimony for the hearing record.

The committee has concluded that it would be unfair to arbitrarily either deny or apply claim reduction [Subsection (b)] in pending cases. There are scores of federal antitrust cases presently pending to which claim reduction could be applied. Although the committee devoted great amounts of time and resources examining the propriety of applying claim reduction to pending cases, it recognizes the impossibility of examining all the facts of every pending case to determine what would achieve the most fair result overall. In some pending cases, it may be eminently fair to apply claim reduction; in other cases it may be unfair to do so. Consequently, the amendment adopted by the committee to S. 995 places the claim reduction decision in the hands of the court, who is knowledgeable of all the facts of any given case and thus able to weigh the equities of the parties. The burden to prove the fairness of claim reduction is placed on those who would seek its benefits. Non-settling defendants would have to demonstrate to the court that it would be inequitable not to apply claim reduction. It is the intention of the committee to give all concerned their day in court to assert the fairness or unfairness of applying claim reduction in pending cases.

[12] In 1979, the Section of Antitrust Law of the American Bar Association prepared a report and recommendation concerning antitrust contribution legislation. Addressing the question of contribution for intentional tortfeasors, the Section noted:

> The argument that intentional tortfeasors should not qualify for the court's protection has been rejected by the Section, like others before it, for a number of reasons. First, a refusal to permit a contribution action by one intentional tortfeasor creates an unjust windfall for another intentional tortfeasor—the joint tortfeasor who, by denial of the right of contribution, thereby avoids paying his share. There is an obvious lack of justice in such randomly visited impact. Second, many antitrust suits do not involve "intentional" behavior in the usual sense of that word. Even in price-fixing cases, the type most often cited as intentional, the Supreme Court has made clear that intent is not a prerequisite to a civil award. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978). The case law is replete with examples of good faith efforts to comply with the antitrust laws that were later held unlawful. [Citations omitted] Finally the existence of "intention" is itself a somewhat elusive concept, particularly when applied in the context of vicarious employer liability for the acts of employees. Antitrust defendants are often companies whose employees are alleged to have committed intentional acts which violate company policy as much as they violate the antitrust laws. Whatever the wisdom of making an employer strictly liable for civil injuries in such circumstances, under no rational scheme of analysis can it be said that such injuries are the product of the "intentional" tort of the company.

Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder. August 17, 1979.

It is important to note that Subsection f(2) of S. 995 as reported reflects the clear intention of the committee that settlements already reached in pending cases may not be overturned or disturbed in any way. A settling defendant may not be forced back into further litigation over the adequacy of its settlement or any other related issue, and is fully protected from further liability.

It is also important to note that Section f(1) of the bill requires the court to make special findings of fact when ruling on whether to apply claim reduction in any particular pending case. The committee notes that under the Federal Rules of Civil Procedure, courts are required to make specific findings of fact in only a few situations. The committee recognizes, however, the great importance of due diligence by the court in making a decision on claim reduction under this bill, by requiring that all the facts and conclusions underlying its decision be set forth in great detail. If a claim reduction ruling is appealed to a higher court, the record must be absolutely clear as to why claim reduction was or was not granted.

Rule 52 of the Federal Rules of Civil Procedure and cases decided pursuant to that rule are instructive here. Rule 52 requires the court to "find the facts specially and state separately its conclusions of law thereon" in all actions tried upon the facts without a jury. Many courts have affirmed the soundness of this requirement and stated the reasons for the rule. In *Roberts* v. *Ross*, 344 F.2d 747 (3rd Cir. 1965) the court of appeals noted that the purpose of Rule 52 was to:

> Require the judge to formulate and articulate his findings and conclusions * * * so that he himself may be satisfied that he has dealt fully and properly with all the issues in the case before he decided it and so that parties involved and the reviewing court may be fully informed as to the basis of the decision.

Further, the court in *Woods Construction Co.* v. *Pool Construction Co.*, 314 F.2d 405 (10th Cir. 1973) noted that Rule 52 "is intended both to aid the appellate court on appeal and to aid the trier of facts in his process of adjudication."

These court opinions on the effect and spirit of Rule 52 precisely reflect the sentiment of the committee on the duty of the court in deciding claim reduction requests in pending cases. The decision must be on a sound basis of law and fact, and the reasons for the decision must be completely set forth for the use of all parties and the reviewing court. If the reviewing court finds the trial court's ruling on claim reduction clearly erroneous it may, of course, reverse and remand the decision with appropriate instructions to correct the trial court's error.

VII. Section-By-Section Analysis

Section 4I., subsection (a) of the bill is designed to cover price-fixing. The phrase "damages attributable to" means the antitrust injury suffered by the plaintiff as a direct result of the sales or purchases of the defendants to or from the plaintiffs.

Subsection (a) emphasizes that a defendant in an antitrust price-fixing suit may use the procedural tools of the Federal Rules of Civil Procedure to effectuate its right of contribution by asserting a cross-

claim, counterclaim, third-party claim or a separate action, whether or not any other party has brought an action for contribution in the suit. This reflects the policy of Rule 14(a) of the Federal Rules of Civil Procedure, which encourages joinder of claims and parties in one proceeding in the interests of fairness and efficiency. The statute as drafted makes it clear that the substantive rights related to the claim of contribution may be asserted in a lawsuit or in a second action, just as provided for in the Federal Rules. (See also Rules 14(b), 42(b) and 52(b).) The courts have the authority to deal with any possible prejudice in such a case through use of judicial discretion to severe, join, or consolidate issues based on considerations of equity and fairness, a process which occurs in every type of litigation. The language allowing a right of contribution, "whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought," means that a defendant may claim contribution against anyone it believes liable for damages relating to the same cause of action in which that defendant has been sued. The person against whom contribution is sought need not be a defendant in the case at that particular time.

Subsection (b) of the bill establishes a statutory right of claim reduction. Participants in a price-fixing conspiracy may now be jointly and severally liable for all of the provable damages resulting from that conspiracy; thus, a defendant in a price-fixing case may be liable for damages attributable not only to its own sales to the plaintiff or plaintiffs, but also for the sales of all co-conspirators, whether or not they are also defendants. Accordingly, if one or more defendants settle a price-fixing case without obtaining an agreement from the plaintiff not to seek treble damages resulting from the settling defendants' sales, the remaining defendant or defendants, if found liable, may be liable to the plaintiff for damages resulting from the settling defendants' sales as well as their own.

Subsection (b) of the bill is designed to eliminate from a plaintiff's total recoverable damages that portion of damages attributable to any defendant with whom it has settled. The first sentence in subsection (b) restates the rule generally applied in antitrust litigation that a covenant not to sue or not to enforce a judgment given to one party as part of a compromise of existing or potential antitrust claims does not discharge the liability of others vis-a-vis the person giving the release or covenant, unless that document, by its terms, expressly provides for such a discharge. The same principle is applied to releases as well.

The second sentence in subsection (b) sets forth the manner for reducing the share of defendant's liability when plaintiffs in price-fixing cases have settled with fewer than all of the persons subject to joint and several liability for the same violation. A case would not have to come to final judgment for the claims reduction formula in subsection (b) to be activated. Under subsection (b), the plaintiff in a case that comes to final judgment need not in all cases prove its total actual damages resulting from the conspiracy, if some of the participants may have settled with the plaintiff. In a case where, for example, there are three defendants and one plaintiff, and plaintiff settles with D1, the amount of damage based on D1's sales would be deducted from the plaintiff's claim and would be out of the case.

Subsection (b) would require a reduction of the plaintiff's award by the greatest of:

(1) *Any amount stipulated by the release or covenant.* Thus, if the plaintiff and defendant agree that, in exchange for reaching a settlement or covenant not to sue, the plaintiff will reduce its claim against the remaining defendant or defendants by a certain amount and stipulate that amount in the release or covenant, that amount will be deducted from the plaintiff's award if it is the greatest of the three sums set forth in subsection (b).

(2) *The amount of consideration paid for the release or covenant.* Whatever amount the defendant actually pays the plaintiff in exchange for a settlement or an agreement not to sue will be deducted from the plaintiff's award if it is the greatest of the three sums set forth in subsection (b).

(3) *Treble the actual damages attributable to the settling person's sales or purchases of goods or services.* This figure represents treble the actual damages suffered by the plaintiff as a result of its purchases from or sales to the settling defendant. (Since it relates to the sales of a defendant who has *settled*, application of this provision obviously does not require any determination that the settling defendant committed an antitrust violation.) In certain circumstances, such as where the damage to the plaintiff resulting from each purchase or sale of a price-fixed item is identical and each conspirator participated in the conspiracy throughout the statutory period, this figure can be derived by dividing the total purchases or sales between the plaintiff and the settling defendant of goods or services subject to the price-fixing conspiracy by the total purchases or sales of the plaintiff of such goods or services and multiplying the result by treble the total actual damages suffered by the plaintiff attributable to the conspiracy. In other circumstances, for example, where the amount of damage to the plaintiff resulting from each sale or purchase varied over time, where the conspirators entered and exited the conspiracy on different dates, or where the items subject to the conspiracy were complex or custom-made so that each purchase or sale caused varying amounts of damage, the courts will base the reduction claim on the basis of sales to or purchases from the plaintiff of the price-fixed goods or services taking into account the extensiveness of the violation, its duration, the transactions affected, etc.[13] In any event, this sum would then be deducted from the plaintiff's claim, if it were greater than (1) or (2), to arrive at the plaintiff's final award.

The following examples illustrate some of the ways in which subsection (b) might be applied:

(1) Plaintiff (P) sues several manufacturers of widgets for price-fixing, alleging actual damages of $110 million resulting from its purchases of price-fixed widgets. P settles with defendant (D) for $1 million. At trial, P proves that D and the other defendants were guilty of fixing prices, that its total damages were $110 million, and that P

[13] A court may *not*, by contrast, inquire into relative culpability—i.e., whether the settling defendant was only a passive participant and not a leader of the conspiracy and whether the "carve out" should be adjusted accordingly. As the Supreme Court has noted, "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." *United States* v. *Paramount Pictures*, 334 U.S. 131, 161 (1948); see also *Olson Farms*, *supra*, at E–2. Because a price-fixing conspiracy could not work unless all participants adhere to the agreement, a plaintiff's injury is the same whether a defendant was "actively" or "passively" involved. Accordingly, a relative culpability inquiry would result in needless and possibly paralyzing judicial burdens.

bought approximately 9.1 percent—$10 million—of its widgets from D. Treble the actual damages attributable to D's sales would be deducted from P's award. Thus, P would be entitled to $330 million ($110 million trebled) minus $30 million ($10 million trebled) or $300 million as a judgment against the remaining defendants. However, if P is the United States and can collect only actual damages, the judge would deduct $10 million from $110 million, leaving $100 million as the judgment.

(2) Assume the same facts as in example (1), including a $1 million settlement, except that P did not actually purchase any widgets from D. P named D as a defendant because if D were a party to the price-fixing conspiracy, it would be jointly and severally liable for the damages suffered by P whether or not D sold any of its widgets to P. As in example (1), P's actual provable damages are once again $110 million or $330 million trebled. However, none of P's actual damages are attributable to D's sales of widgets, and accordingly, no deduction from P's actual damages should be made pursuant to item (3) of subsection (b) of the bill. The judge would, however, deduct $1 million from P's claim, leaving a $329 million judgment against the remaining defendants.

Although P's final judgment would vary in each example, each result would follow from a consistent application of the claim reduction rule contained in subsection (b). The results would be predictable and they would protect nonsettling defendants against unfair settlements without discouraging settlements or complicating antitrust litigation.

Example (2) illustrates the relationship between joint and several liability and the claim reduction rule contained in subsection (b). D would be jointly and severally liable for P's damages because, in a very real sense, D's participation in the price-fixing conspiracy contributed to P's injury. For example, if D had refused to participate in the conspiracy, it might have failed, or if D had ended its participation at an early date and exposed the existence of the conspiracy, P might have suffered less injury than it actually suffered. Therefore, fairness requires that D should be liable to P for P's damages caused by D's participation in the conspiracy. At the same time, because P did not purchase any widgets from D during the conspiracy, none of P's actual damages would be attributable to D's sales, and therefore, P's settlement with D should not reduce P's judgment against the remaining defendants any more than the amount of the settlement. Moreover, P's settlement with D is not unfair to any other defendant. The amount of damages claimed by P was not increased by including D as a defendant nor would it be reduced by eliminating D. After contribution, each remaining defendant would end up paying only for that portion of P's damages attributable to its own sales to P. Thus, the consistent application of the claim reduction rule in subsection (b) in each example will provide predictable limitations on the liability of the various defendants.

Subsection (c). To protect the settlement process, subsection (c) provides that any person who settles a price-fixing suit in good faith is not liable for contribution to any other person with respect to the claim that is the subject of the settlement. Defendants will not enter into settlement agreements unless they know in advance that the settlement will end conclusively their involvement in litigation and exposure

to liability. That is the principal purpose of settling, and a major purpose of this bill is to help effectuate just settlements.

The committee recognizes that, under the procedure set forth in subsection (b) defendants who do not settle will ordinarily not be liable to the plaintiff for damages attributable to a settling defendant's sales or purchases. Thus, nonsettling defendants will not have a basis upon which to claim contribution for such damages from settling defendants. However, to encourage settlements, subsection (c) has been included to provide conclusively that a settling party would not be liable to other parties for contribution.

Two provisions of subsection (c) require further explanation. First, subsection (c) prohibits suits for contribution only against persons settling "in good faith." The committee does not intend thereby to create a new substantive standard for judging the validity of settlements; most arms-length agreements to end litigation will be in good faith, and the traditional concepts regarding good faith will prevail.

Second, subsection (c) prohibits claims for contribution against persons entering into agreements providing for settlements unless such settlements are not consummated. The purpose of this provision is to protect defendants who have, for example, agreed to pay a plaintiff a sum of money over time in exchange for a settlement, with the actual settlement to be effected after the last payment is made. Although the formal settlement may not be completed until all payments have been received, the existence of the agreement to settle will protect the defendant from claims for contribution until the settlement is consummated, unless prior to that time the agreement is broken.

Subsection (d) emphasizes that the principles of joint and several liability continue to apply to price-fixing suits. That is to say, the plaintiff's burdens are not increased. They need still sue only one defendant and collect damages attributable to all (although, of course, that defendant has a claim against the other defendants for contribution). Moreover, the fact that one defendant is insolvent or outside the jurisdiction of the court does not impair the plaintiffs' rights, although it may adversely affect the defendants' ability to obtain contribution.

Subsection (e) provides that application of this Act will be prospective from date of enactment. Subsections (f)(1) and (f)(2), however, modify subsection (e) to the extent that the court is authorized to apply claim reduction (subsection (b)) in pending cases.

Subsection (f)(1) provides that the court shall apply claim reduction in a pending case if the party seeking claim reduction proves that it would be inequitable not to apply claim reduction in the case. The court is to consider "all the circumstances" of the case in making this decision. The committee anticipates that a wide variety of factors should be considered by the court in making its decision on claim reduction. The term "pending" means those cases which have not been finally adjudicated at the time of enactment. *See*, *Linkletter* v. *Walker*, 381 U.S. 622 n. 5 (1965).

The court must enter a written opinion analyzing all the facts and reasons which lead to its decision.

As previously noted, subsection (f)(2) strictly prohibits the court from utilizing the Act as a basis to rescind, disapprove, reform or modify existing settlements.

Subsection (g) provides that if any subsection of the Act is found invalid, it may be severed from the remainder of the Act. Subsections (f)(1) and (f)(2), however, are non-severable. Thus, if for any reason subsection (f)(1) were found to be invalid, both it and subsection (f)(2) would be severed from the Act, and vice-versa.

VIII. Changes in Existing Law

In compliance with subsection (4) of Rule XXIX of the Standing Rules of the Senate, Section 4 of the Clayton Act is amended by the bill, S. 995 as reported, by adding the following new subsection:

Clayton Act

Sec. 4 (15 U.S.C. Sec. 15):

Sec. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution; with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

(e) This section shall apply to all actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.

(f)(1) The claim reduction principle of subsection (b) of this section shall also apply to actions alleging an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act which are pending on the date of enactment of this section, if upon proof by any party subject to liability for damages in such an action, the court determines that it would be inequitable, in light of all the circumstances and

notwithstanding subsection (f)(2), not to apply the principle in that action. In ruling on a request to apply claim reduction, the court shall find the facts specially.

(f)(2) No agreement to settle, compromise, or release a claim under section 4, 4A, or 4C of this Act which has been signed by the parties prior to the date of enactment of this section may be rescinded, disapproved, reformed, or modified by the parties or by the court because of the application of the claim reduction principle, except upon the written consent of all the parties thereto.

(g) Each subsection of this section is severable from all other subsections, and the invalidity of any subsection for any reason shall not affect the validity of the remaining subsections: Provided, That subsections (f)(1) and (f)(2) are not severable from each other, and the invalidity of any provision of those subsections as applied in an action shall render the remainder of those subsections inapplicable in that action.

IX. Cost of Legislation

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., April 1, 1982.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 995, a bill to provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act, as ordered reported by the Senate Committee on the Judiciary, March 31, 1982.

The bill amends the Clayton Act to change the process of allocating damages in an antitrust price-fixing suit among the parties involved in the conspiracy according to their share in the price-fixing scheme. Based upon this review, it is expected that no significant cost will be incurred by the government as a result of enactment of this legislation.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Raymond C. Scheppach,
(For Alice M. Rivlin, Director).

X. Additional Views

SUPPLEMENTAL VIEWS OF SENATOR GRASSLEY

The antitrust laws are an essential element of our overall economic policy. The Antitrust Equal Enforcement Act of 1981 is a necessary refinement of these laws. We depend upon antitrust as our primary means of preserving vigorous competition throughout our economy which will ultimately result in the lowest possible prices for goods and services to the consumer.

The antitrust laws are in many respects a substitute for government control of the economy. Controlled markets are equally repugnant whether they result from government regulation or from private cartels. Thus, the effective fair enforcement of these laws should continue to be afforded high priority.

This legislation corrects a serious distortion that has developed during recent years in antitrust litigation. Under present law in most federal jurisdictions, each defendant in a private, antitrust price-fixing case is potentially liable for damages based upon the sales of its entire industry irrespective of the company's market share. Thus a company with a small market share can be exposed to damage claims in the hundreds of millions of dollars based upon the sales of an entire industry.

The effect of this is to undermine deterrence as well as deprive companies of their fundamental right to go to trial and take an appeal. This occurs because the most culpable defendants will necessarily settle a case first—since they know they cannot go to trial—at amounts far less than their share of damages. Less culpable and innocent defendants are faced with rapidly escalating potential damage exposure based upon the sales of settling defendants. Class action plaintiffs' lawyers have taken advantage of this situation by demanding enormous sums from each successive company without regard to culpability. Often, the most culpable pay the least; the least culpable pay the most. This is wrong.

We have studied a number of possible legislative solutions to this problem but the most satisfactory approach is the familiar solution used in other areas of federal law: rights of contribution among litigating parties and claim reduction where there have been settlements. This preserves the policy favoring settlement by providing that no settling party can be sued for contribution. It protects litigating defendants from imposition of massive industry-wide damages, based on the sales of other defendants. In short, S. 995 adjusts the anti-trust remedies to prevent private treble damage actions from destroying rather than enhancing competition.

This legislation is needed to ensure that defendants convinced of their innocence will be permitted, as a practical matter, to litigate their case. It is necessary to avoid the effect of the current state of the law which, in many instances, forces defendants to settle regard-

less of guilt or innocence, when faced with astronomical liability. This problem is particularly acute for defendants with smaller market shares.

The current state of affairs was never intended by Congress, but is the unforeseen result of a number of independent developments in the case law. The private remedy of treble damages plus attorneys' fees was provided in the Sherman Act, in 1890. Shortly after the turn of the century, the principle of joint and several liability was judicially adopted in an early antitrust case in which 2 of only 6 alleged conspirators were sued for total claimed overcharges of $15,000. In 1962, the doctrine of fraudulent concealment was judicially allowed for the first time in an antitrust case to permit recovery beyond the four-year statutory period of limitations. Today, following the 1966 revision of the class action rules embodied in Rule 23 of the Federal Rules of Civil Procedure, the potential for destructive and, indeed, anti-competitive damages have multiplied from a few thousand to billions of dollars and in some cases the potential has become a reality.

These results are a mockery of justice. If we permit this antitrust remedial scheme to continue, results such as these will seriously undermine the very purpose of the antitrust laws. We have considered these issues for over a year and while I did not support any of the amendments, I did vote in favor of the bill as amended.

The objections raised by opponents of S. 995 are unconvincing. No evidence was submitted to us that the application of S. 995, as reported, would undermine the deterrent effect of the antitrust laws. It will have no effect on the very substantial criminal penalties. It should serve to increase respect for these laws by serving notice that no defendant can escape liability by settling cheap and shifting its liability to someone else. That should improve enforcement.

No additional complexity will be created in any case because the claim reduction principle of S. 995 is based upon the market share of each defendant, determined by sales or purchases. These facts are virtually always part of the record in any case within the scope of this legislation.

As stated by former Judge Renfrew: "Claim reduction will not add any new cases to the courts' dockets, add new parties or create new complexities. The calculation by which a plaintiff's claim must be reduced will be set forth in the record, and in almost all horizontal price-fixing cases will be the market shares or sales volume of the various defendants. (Statement of Charles B. Renfrew Before the United States Senate Committee on the Judiciary, Concerning Application of the Antitrust Equal Enforcement Act of 1981 to Pending cases, at 26 (February 10, 1982))."

Nor does S. 995, as amended, threaten any existing settlement. It expressly safeguards all previously signed settlement agreements (or releases). If the courts would apply claim reduction only upon reconsideration or disapproval of any settlement, the claim reduction section could not be applied.

This legislation will remedy many problems existing today. As to pending cases, the courts will determine the issue of fairness—the court will decide whether, under the facts of a particular case, it would be inequitable not to apply the claim reduction principle to the particular case involved. Fundamentally, however, the normal rule should be that a company pays damages based upon its own market share.

SUPPLEMENTAL VIEWS ON S. 995 BY SENATOR ARLEN SPECTER

After extensive consideration, it is my conclusion that S. 995 should not be made applicable to pending cases. In my relatively brief tenure in the Senate, I have probably spent more time on this bill than any other single matter, and I have come to the issue with background in the fields of federal court litigation, the antitrust laws and the laws on contribution.

It is undeniable that there are pending cases that involve enormous losses to companies under circumstances which have significant elements of unfairness. The issue before this Committee is whether we should change existing law through this legislation to alter the balance between parties to this pending litigation. In my judgment, we should not.

I say that because these cases involve decisions by sophisticated, experienced, highly-qualified lawyers and businessmen. On all sides of these complex litigation matters, the issues have been researched, studied, and extensively analyzed. Risks were undertaken by all parties to the pending cases with full knowledge of the existing law. That existing balance, in my judgment, should not be disturbed by the Congress with respect to pending cases.

ARLEN SPECTER.

SUPPLEMENTAL VIEWS OF SENATORS METZENBAUM AND KENNEDY ON S. 995

I. Introduction

In *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the United States Supreme Court decided that no right to contribution among antitrust defendants exists under current law. In so holding, the court noted that the

> very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. The absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other factors unnecessary. (451 U.S. 630 at 639.)

Thus, the Supreme Court decided that if contribution is to be available to antitrust defendants, Congress must expressly provide for it.

With S. 995, this committee responds to the *Texas Industries* decision by creating a right of contribution for price-fixers which will indeed "soften the blow on joint wrongdoers." In so doing, the Committee severely undermines the ability of private antitrust enforcement to deter price-fixing.

Proponents of S. 995 urge its passage to protect small businesses that are defendants in price-fixing cases. In fact, both the contribution and the mandatory claim reduction aspects of the bill, which will be discussed more fully below, would hurt the very parties they are designed to protect. Contribution and mandatory claim reduction will both deter settlement of price-fixing cases. This will force small businesses that happen to be defendants in these cases to absorb costly litigation expenses and to risk treble damage judgments, rather than to settle at the early stages of litigation for amounts which are fractions of the actual damages they may have caused.

Moreover, it insults small businesses to imply that they will benefit from a bill designed to help price-fixers reduce their potential liability. Small businesses are usually the victims of price-fixing. By undermining the ability of the antitrust laws to deter price-fixing, S. 995 in both its aspects plainly hurts small businesses.

We do not necessarily oppose the concept of contribution or claim reduction. As we discuss below a proposal allowing the courts to determine whether contribution or claim reduction should be available under the facts of a particular case might indeed be justified. However, S. 995—limited as it is to price-fixing cases and with its mandatory claim reduction provision—severely damages the ability of our antitrust laws to protect the free enterprise system from conspiracies which restrain trade.

II. Description of S. 995

S. 995 alters price-fixers' exposure to antitrust damages liability in two principal ways. First, it permits defendants in price-fixing suits to bring into the case for the purpose of seeking contribution other parties whom they allege also participated in the unlawful conspiracy, or to file separate legal actions against such parties. Currently such "joinder" of third-party defendants is not permitted in any antitrust suits. That is, under current law whichever firms or individuals are sued for price-fixing can be held responsible for all of the injury caused by their conspiracy. Exposing potential price-fixers to such "joint and several liability" deters their future illegal activity. S. 995, by permitting price-fixers to spread their potential liability, seriously undermines this deterrent effect and makes private enforcement vastly more complicated and protracted.

Second, S. 995 provides for mandatory reduction of each defendant's liability by the greatest of three figures, which, in most cases will be three times the damages attributable to the market shares of the firms who have settled prior to judgment. This mandatory "claim reduction" aspect of S. 995 sharply limits the potential liability of defendants in price-fixing cases—precisely those cases where defendants should be most severely punished for their illegal behavior. In addition, mandatory claim reduction will clearly discourage settlements.

S. 995 would also permit the retroactive application of the claim reduction feature to all pending cases even where extensive negotiations, settlement and trials have occurred. This amounts to changing the rules in the middle of the case and is particularly unfair since the parties have acted in reliance on the current rules of joint and several liability.

III. Summary

A. CONTRIBUTION

Proponents of S. 995 base their case on the alleged "unfairness" of current antitrust law in its treatment of price-fixers. We agree, however, with the following observation of Professors Easterbrook and Landes and Judge Posner that:

> The question then is whether price-fixing and other unlawful joint conduct under the antitrust laws are so free from moral opprobrium that we are inclined to listen sympathetically to a claim of unfairness raised by a conspirator who has been forced to pay more than his "fair" share of the plaintiff's damages. Those who believe that enforcement of the antitrust laws is as important as the enforcement of other criminal laws will resist this suggestion.
>
> A fairness argument from the mouth of the intentional wrongdoer is unappealing because the wrongdoer can avoid his "predicament" by conforming his conduct to the law's demands. Easterbrook, Landes, and Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Econ. 331, 340 (1980).

S. 995 would create rather than relieve, unfairness by requiring plaintiffs injured by defendants' conduct to give up their longstanding

right to hold the defendants jointly and severally liable for all of the harm caused by the conspiracy.

The unfairness to injured plaintiffs is compounded by the specter of additional complexity and delay in the resolution of antitrust cases mandated by S. 995. A senior United States district court judge recognized as a leading expert in the handling of complex price-fixing litigation described the probable effect of a right to contribution in one major case:

> In the *Folding Carton* civil litigation, there were over 40 companies and individuals named as defendants. If contribution and claim reduction had been the law at the time, each of these defendants could have and undoubtedly would have filed cross-claims for contribution against the other defendants and these hundreds of additional claims, cross-claims, third-party claims, answers and related motions would have seriously threatened any chance for the successful management of the case. Letter of Honorable Hubert L. Will to Honorable Howard Metzenbaum, March 17, 1982. (See exhibit "A")

This complexity would not only make the courts' job exceedingly difficult, it may well require the plaintiffs to wait endlessly while price-fixing defendants fight among themselves over how much each will pay.

Finally, S. 995 is designed to apply only to those antitrust violations which are most clearly unlawful and have the most harmful economic impact upon American businesses and consumers: horizontal price-fixing. Intentional wrongdoers of this sort have never been the beneficiaries of a broad right of contribution.

While contribution may be justified in cases where relative fault and other factors may cause manifest injustice if one party were held solely liable—such as the *Professional Beauty Supply Case*, *supra*—S. 995 would apply solely in cases where defendants' anticompetitive scheme can be successful only if each of the co-conspirators jointly and knowingly participate.

B. MANDATORY CLAIM REDUCTION

The concept of mandatory claim reduction embodied in S. 995 would strike a crippling blow to the successful private enforcement of the antitrust laws. Under the formula provided in the bill, S. 995 would, in nearly all cases, reduce nonsettling defendants' liability by three times the damages attributable to settling defendants' market shares. Not only would this provision further increase the procedural complexities and resulting unfairness flowing from the contribution aspect of the bill, it would seriously undermine the ability and incentive of antitrust plaintiffs to settle price-fixing cases, which is critical to effective enforcement of antitrust laws against price-fixing through private treble damages actions.

Some members of this committee who wish to help small businesses which have become involved in massive price-fixing litigation have expressed the view that S. 995 will aid these firms by eliminating plaintiffs' "whipsaw" tactics leading to so-called "coercive" settlements. However, the bill in all probability will hurt, not help, small business.

The current system allows plaintiffs to settle early with small, less well-financed firms while continuing to pursue recovery of the rest of the damages caused by the conspiracy from the defendants who refuse to settle. Sice settlements in price-fixing cases are invariably less than each firm's market share measure of injury, S. 995, by mandating claim reduction based on market share not the amount of settlement, would remove this incentive to settle early. Plaintiffs desiring to be made as whole as possible would be required to keep as many parties in the case to the end as they can.

The mandatory claim reduction principle would not only work to the detriment of small business defendants, it would discourage private enforcement in general by decreasing the likelihood that injured plaintiffs would be able to recover their losses within a reasonable period of time at minimum necessary litigation expense. Because of this effect, S. 995 would deprive the general public of the benefits of private enforcement and increase the incentives of firms to attempt to evade the rigors of the competitive system by fixing prices.

Finally, the "treble the actual damages attributable to the settling person's sales or purchases of goods or services" standard for claim reduction found in S. 995 is so vague as to be totally impracticable in a sensible judicial system. Definitions and measures of market shares take up an enormous percentage of the resources spent in antitrust litigation already. The "sales" test would not only increase the opportunity for dilatory litigation, it would raise numerous legitimate issues as to the relationship of damages suffered by plaintiffs and the sales to which those damages are "attributable." Unfortunately, not a single witness in the many days of hearings devoted to S. 995 and its predecessor has suggested an alternative standard which would be more workable. This fundamental flaw in the claim reduction aspect of S. 995 should be reason enough not to support this part of the bill.

C. RETROACTIVITY

The retroactive application of the bill's claim reduction feature would allow courts to reduce non-settling defendants' liability even where those who settled did so in reliance on the original extent of that liability. This would be unfair to plaintiffs who could face the loss of hundreds of millions of dollars of their rightful reimbursement. And it would be unfair to settling defendants who agreed to settlement based on a different understanding of what their own exposure would be and who could be required to participate in extensive litigation about the amount of claim reduction.

III. Contribution

A. CONTRIBUTION WOULD UNDERMINE THE ABILITY OF THE ANTITRUST LAW TO DETER PRICE-FIXING

The contribution provisions of S. 995 would undermine the ability of our antitrust law to deter price-fixing (1) by removing the threat of joint and several liability for treble the damages caused by the price-fixing conspiracy and (2) by discouraging private price-fixing suits through the addition of layer upon layer of litigation complexities.

Joint and several liability is a substantial deterrent to potential price-fixers. A firm making calculations of the risk involved in engaging in illegal price-fixing activity must consider the possibility that it will be liable for *all* of the injury caused by the price-fixing conspiracy. Under current law it may not bring into a case other parties whom it alleges were part of the price-fixing scheme in order to seek contribution from them. Potential price-fixers build this lack of contribution—this total liability for all of the damages caused by the conspiracy—into their comparative risk calculations.

S. 995 changes all of this. Under S. 995 potential price-fixers know that they may spread the liability around among many of the parties involved in the price-fixing conspiracy. No one potential law-breaker risks exposure to all of the damages caused by the conspiracy. This inevitably will change the firm's risk equation and make price-fixing appear less costly.

Contribution will also make actual price-fixers who are sued less likely to settle because their maximum exposure from going to trial is reduced by their ability to spread the risk. Yet, as discussed more fully with respect to claim reduction, early settlement of claims against some defendants is essential to effective private enforcement of the antitrust laws.

In addition, by making price-fixing cases more complex, time-consuming and expensive, the bill's contribution provisions will at best make private price-fixing suits less effective deterrents and could actually discourage the filing of such lawsuits. Permitting contribution will shift control of antitrust lawsuits from the plaintiffs to the often huge and well-financed defendants who frequently seem to increase the complexity of the case in the hope that their interests will be served by delay and confusion. The right to seek contribution is a right to complicate.

Contribution could easily create more litigation than the plaintiffs' suit on the merits, because the number of additional parties brought in by named defendants could be tremendous. Taxpayers would be required to shoulder the burden of this increase in court costs. Victims of price-fixing would be seriously burdened by having to litigate against an increased number of well-heeled defendants and by being delayed in receiving their rightful damages. As Judge Will—who presided over the *Folding Carton* antitrust litigation—expressed the problem:

> All of these additional management problems fly in the face of the Supreme Court's message in *Illinois Brick*, 431 U.S. 720 (1977), that policies must be shaped to eliminate, not to add to, the complexities of antitrust litigation. From my vantage point as a judge who has spent over two decades presiding over such complex litigation, it is clear to me that contribution and claim reduction would add enormous difficulties in managing antitrust cases which in turn would threaten the basic antitrust enforcement mechanisms currently in place. Judge Will letter, *supra*, at 4.

Judge Will's final point is a significant one. Not only will the complexities introduced by S. 995's contribution provision increase the burden in cases before the courts, it will likely deter many price-fixing

victims from filing suit in the first place. By increasing the time and expense involved in achieving an antitrust remedy, S. 995 will discourage small firms who have suffered price-fixing overcharges from attempting the difficult process of seeing an antitrust suit through to the finish. In this time of budget cuts and limited government resources, the private enforcement of the antitrust laws is a more important means than ever for assuring a competitive and productive economy. Anything which "flies in the face" of the body of Supreme Court cases encouraging the availability of the treble damage remedy as a means for deterring antitrust violations should be resisted strenuously. *See, e.g., Reiter* v. *Sonotone Corp.* 442 U.S. 330, 344 (1979); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Perma Life Mufflers, Inc.* v. *International Parts Corp.* 392 U.S. 134, 139 (1968).

B. CONTRIBUTION WOULD CREATE, RATHER THAN RELIEVE, UNFAIRNESS

As noted above, the Supreme Court in the *Texas Industries* decision put to rest the idea that a right to contribution exists under current antitrust law. In so holding, the Court accurately described earlier Congress' lack of sympathy for price-fixers as a group. It stated that it is

> . . . clear that the Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade. On the contrary petitioner "is a member of the class whose activities Congress intended to regulate for the protection and benefit *of an entirely distinct class*," . . . the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. *Texas Industries, supra*, 451 U.S. 630 at 639. (Emphasis in original, citation omitted).

S. 995 would, however, "ameliorate the liability of wrongdoers." At the same time it would cause severe hardship to victims of price-fixing. Defense attorneys already have much opportunity to stretch a plaintiff's wait for its just recovery over many years. As one leading defense lawyer candidly put it:

> I was born, I think, to be a protractor . . . I could take the simplest antitrust case and protract it for the defense almost to infinity . . . (one case) lasted 14 years . . . despite 50,000 pages of testimony there really wasn't any dispute about the facts . . . We won that case, and, as you know, my firm's meter was running all the time—every month for 14 years. Address of Bruce Bromley, senior partner of Cravath, Swaine & Moore, to Stanford Law School graduation, May, 1972.

As noted above, the right of contribution created by S. 995 would inevitably add years to such already interminable litigation, depriving price-fixing victims of their rightful recovery.

The bill would also add enormous litigation costs to small business defendants trapped in the maze of cross-claims made possible by S. 995. Thus, the bill would be unfair to the very parties whom it is allegedly designed to aid—small business defendants—by adding layer upon layer of expensive litigation to their rightful day in court.

C. S. 995 WOULD ALLOW CONTRIBUTION IN THOSE CASES LEAST WORTHY OF EQUITABLE RELIEF

S. 995 would permit contribution and thereby "ameliorate the liability of wrongdoers" in precisely those cases involving the most serious and hard-core antitrust violation: price-fixing. Price-fixers are often punished through criminal proceedings for their cold-blooded disregard of the rules of the free enterprise system. Giving power to price-fixers to undermine their victims' right to keep the case manageable is unjustified and unprecedented.

Plaintiffs frequently decide for good reason not to sue every potential defendant. There is simply no reason to deny them such control over suits involving price-fixing violations.

Even more disturbing, while S. 995 grants price-fixers the benefits of contribution, the bill would not permit such equitable relief in non-price-fixing cases where it might be more appropriate. For example, in the *Professional Beauty* case, 594 F.2d 1179 (8th Cir., 1979), allowing contribution might well shift liability to a person who is, in fact, primarily responsible for plaintiff's antitrust injury. In that case, the plaintiff, a wholesaler of beauty supplies, sued a competing wholesaler for conspiring to monopolize under section 2 of the Sherman Act. The plaintiff claimed that the defendant had caused a manufacturer of beauty supplies, the alleged co-conspirator, to terminate the plaintiff as one of the manufacturer's wholesalers. The court of appeals declined to follow the previous decisions automatically denying contribution in all antitrust cases. Instead, it directed the district court to determine whether equitable considerations dictated allowing the defendant wholesaler to obtain contribution from the manufacturer. The manufacturer who was not joined as a defendant, may have been the dominant party in the conspiracy to terminate the plaintiff as a wholesaler.

Although the decision of the court of appeals no longer accurately reflects the law because of the Supreme Court's holding in *Texas Industries*, we believe that *Professional Beauty Supply* is the type of antitrust case in which contribution might be justified. However, under the provisions of S. 995, contribution would not be available in such cases.

D. THE ABSENCE OF CONTRIBUTION DOES NOT BURDEN SMALL BUSINESS DEFENDANTS

Under current law, plaintiffs may sue whichever parties they believe will best be able to restore them to the position they would be in absent the price-fixing conspiracy. Contrary to the claims of some proponents of S. 995, there is no evidence that this power has resulted in an undue burden on small business defendants. As one group of commentators has said:

> (T)here is no apparent reason why antitrust plaintiffs should generally seek to obtain disproportionately large recoveries from the smaller or less responsible defendants. If a plaintiff settles for a small amount with the larger defendants (or fails to name them as parties) and proceeds to trial against the smaller defendants, he increases his risk that any judgment

will be unsatisfactory. Moreover, smaller defendants may be able to enlist the sympathy of the jury, Easterbrook, Landes, and Posner, *supra*, at 343.

IV. Mandatory Claim Reduction [1]

A. MANDATORY CLAIM REDUCTION WILL UNDERMINE ANTITRUST ENFORCEMENT BY DISCOURAGING SETTLEMENTS

Businesses who are victims of a wide-ranging price-fixing conspiracy immediately become aware of several antitrust facts-of-life. First, litigation of their claims will require much time and expense, diverting corporate resources away from their most useful purpose of producing the firm's goods or services. Second, not all defendants will be equally able to defend the suit or, if found liable, to pay the plaintiffs' damages. Finally, these victims will discover that the only efficient means to be made reasonably whole without too much waste of corporate resources will be early settlements with as many of the defendants as possible.

Mandatory claim reduction, however, will sharply discourage settlements by preventing plaintiffs from recovering the entire amount of damages caused by a price-fixing conspiracy. This is because in most cases non-settling defendants' liability to plaintiffs will be reduced by an amount equal to three times the damages attributable to the settling firms' market shares rather than by the actual amount of settlement. The claim reduction amount will inevitably be larger than the actual settlement amount because there is little incentive for defendants to settle before trial for an amount equal to their liability after trial.

Not only is such claim reduction unfair to victims of price-fixing conspiracies, it also destroys their incentive to seek early settlements. This makes the victims' private suits much less manageable and weakens such suits as enforcement tools against price-fixing.

By discouraging settlements, S. 995 would require small business plaintiffs to finance litigation, not out of settlement pools, but out of the funds that will be diverted from more productive endeavors. As one lead attorney for a group of business plaintiffs noted, "[t]heir out-of-pocket expenses have been in the millions." Statement of Stephen D. Susman, Feb. 10, 1982. In addition to having to put up the money to finance the litigation from their own pockets, business plaintiffs will remain deprived of their rightful recovery of price-fixed overcharges for many more years by S. 995. This will occur while often criminal price-fixers reap the benefits of their ill-gotten gain throughout the litigation period.

[1] As discussed above, the Supreme Court's decision in the *Texas Industries* case foreclosed argument that a right of contribution might be judicially recognized under existing antitrust law. However, one court subsequent to *Texas Industries* has held that the decision did not preclude it from reducing a judgment against a nonsettling defendant by an amount in excess of the settlement paid to the plaintiff by the other co-conspirators. *Burlington Industries, Inc.* v. *Deering Milliken, Inc.*, Civ. No. 71-306 (D. S. Car., Feb. 10, 1982). The District Court in the *Burlington* opinion did not explain why it believed that the Supreme Court left this issue open, nor did it explain why it believed that the antitrust laws allowed this result. Ultimately, this judgment will be reviewed by the court of appeals and possibly by the Supreme Court. Therefore, we do not find the *Burlington* decision of much help in answering the question with which we are faced: Does the mandatory claim reduction provision of S. 995 improve or impede the successful private enforcement of the antitrust laws?

As one court described this inherent value of settlements to plaintiffs:

> These settlements conferred a further benefit on the plaintiff class by permitting it to reduce the complexity and expense of trial against the remaining nonsettling defendants: Plaintiffs were able to streamline their evidence to focus on the conduct of a small group of nonsettling defendants. Thus, they not only saved trial expenses by settling but also improved their chances of success in trial against nonsettling defendants and in defending any resulting verdict on appeal.
>
> * * * * * * *
>
> Most important, these are partial settlements that specifically and explicitly preserved plaintiffs' right to litigate against all remaining defendants for the *entire* amount of plaintiffs' damages, on the basis of joint and several liability, for all the injury caused by the conspiracy. The court considered this to be a valuable provision supporting the approval of the settlements.

In re Corrugated Container Antitrust Litigation, 1981–1 Trade Cas. (CCH) par. 64, 114, at 76, 703 (S.D. Tex., June 4, 1981) (emphasis in original).

The mandatory claim reduction provision of S. 995 does not preserve "plaintiffs' right to litigate against all remaining defendants for the *entire* amount of plaintiffs' damages, on the basis of joint and several liability, for *all* the injury caused by the conspiracy." It therefore makes settlements much less likely and private enforcement much less effective.

B. MANDATORY CLAIM REDUCTION WOULD INJURE THE VERY SMALL BUSINESSES IT IS ALLEGEDLY DESIGNED TO PROTECT

S. 995 will also have the severe effect of injuring the very businesses it is designed to protect. Proponents of S. 995 argue that mandatory claim reduction is necessary to prevent so-called "sweetheart" settlements between plaintiffs and certain defendants that allegedly work to the detriment of small business defendants. The supposed problem is that plaintiffs will negotiate quick and small settlements with large, more culpable defendants while saving the smaller, presumably less guilty firms for the full weight of industry-wide treble damages after trial. Not only is there no evidence whatsoever that plaintiffs routinely adopt this strategy, but such a practice would be against plaintiffs' interests in maximizing the recovery of losses they suffered as a result of the price-fixing conspiracy.

In fact mandatory claim reduction would compel plaintiffs to refuse to settle with the very firms which can least afford trial and the risk of enormous damage liability. Without the ability to receive all of their rightful damages from the nonsettling parties, plaintiffs will be required to keep as many of the defendants in the litigation as possible. As one experienced former state assistant attorney general testified, the need to recover as much of the damages as one can will work against small businesses:

Senator METZENBAUM. The small business people would have been kept in the cases with the attendant legal expenses if S. 995 had been the law?

Mr. REED. Absolutely. The attendant legal expenses and the attendant exposure to a treble damage judgment, because by holding them in to a treble damage judgment would be the only means that I could get the full recovery for the members of the class and the individual plaintiffs who sued.[2]

C. MANDATORY CLAIM REDUCTION WILL LESSEN THE DETERRENT EFFECT OF PRIVATE PRICE-FIXING SUITS

The many burdens placed on private litigants who seek only to recover for the antitrust injuries they have suffered will have effects far beyond the parties involved in a given case. By increasing the time and expense necessary to see a price-fixing case through to completion, S. 995's claim reduction provision will discourage the filing of private lawsuits and lessen the deterrent value of the treble damage remedy. This in turn will mean artificially higher prices throughout our economy as more and more firms calculate that price-fixing is worth the reduced risk of being caught and punished by private antitrust enforcement.

Some of the proponents of S. 995 argue that existing criminal penalties are sufficient to deter price-fixers. However, this propostion is manifestly incorrect, as the wealth of pending price-fixing cases shows. The burden of having to assemble proof "beyond a reasonable doubt" is much greater than the civil law standard of a preponderance of the evidence. For example, in the corrugated container industry, several firms which were acquitted of criminal charges were found liable by a civil jury of having conspired for over a decade to fix prices across the industry. *See In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex. Sept. 13, 1980).

To the extent that the threat of treble damages has worked as an effective deterrent of at least some potential antitrust violators in the past, S. 995 would seriously undermine this beneficial effect. If a potential price-fixer knows that it may be held liable for three times the entire amount of overcharges resulting from the price-fixing conspiracy it will calculate this risk versus the value to it of making illegal profits. However, if it knows that, even if it gets caught, it will only have to pay back its own illegal profits, the calculus tilts greatly toward the "profitability" of price-fixing.

One might argue that this example ignores the existing deterrent of the treble damage penalty itself: i.e., that firms even with claim reduction would consider the possibility of paying a penalty if they are caught price-fixing. However, the pressures toward settlement described above mean that plaintiffs rarely recover all of their *actual* damages through private litigation under existing law, let alone treble damage penalties. Firms would not usually settle prior to trial for the

[2] As noted above, we do not oppose Federal court *Discretionary* authority to reduce plaintiffs' potential recoveries by amounts greater than the settlement amounts. However, we believe that the court's discretion should be restricted to limiting a particular defendants' liability to some multiple of its actual damages—greater than treble—in order to maintain the deferent effect of joint and several liability. This will allow the courts to protect those small companies that want to litigate their liability but are faced with damage exposure far in excess of their net worths because of earlier settlements by their co-defendants.

amount that they would be held liable for after trial; to do so would remove many of the benefits of settlement from a defendant's perspective. The settlement process is necessarily a compromise where the plaintiff gives up some of the post-trial recovery in exchange for immediate gains, while the defendant trades risk of large liability for the opportunity for additional delay. In the *Corrugated* case, for example, acceptance of the plaintiffs' *post-trial* settlement offer with the only remaining nonsettling defendant, together with settlements negotiated with thirty-six other defendants, would provide the victims of the conspiracy with just over half of the actual damages expected to be found by the jury. Thus, not only may firms monitoring the lawsuit be assured that they will not in all likelihood pay a penalty if caught price-fixing, but they probably will not even have to return all of the illegal gain they will enjoy from the time of the overcharges until settlement appears fruitful.

Even in those cases which go to trial, the statute of limitations provisions of current law frequently mean that defendants are only liable for a bare fraction of the actual damages they cause. Under section 4B of the Clayton Act, a firm may only recover for antitrust damages measuring back four years from the time that the plaintiff should reasonably have been aware of the illegal activity. This is the law regardless of how long the conspiracy may have operated to increase the price of goods or services within the ambit of the conspiracy. Thus, price-fixers know that if they do not take overt steps to conceal their activity, they will be home free with price-fixed booty that goes undetected for four years. Once again, the *Corrugated* case serves as a vivid example of this problem. In that case, the jury found that a conspiracy had been in effect from at least 1964 through 1975, even though the Supreme Court had expressly found the particular type of conduct illegal in the *Container Corp.* case, 393 U.S. 333, in 1969 and some of the firms had been expressly enjoined from repeating the conduct in 1970. By the time the plaintiff class of over 200,000 American businesses had discovered and challenged this scheme, the defendants had realized the likelihood of being caught and had stopped their illegal activity. Thus, plaintiffs could only sue for overcharges suffered over less than a three year period (the time within the four years prior to suit that the jury found the conspiracy to have been in effect). The estimated *actual* damages suffered by the plaintiffs over the entire course of the conspiracy, and hence, suffered by all ultimate consumers of the defendants' products, was approximately $2.5 billion. To date, plaintiffs have recovered only about $300 million or 15 percent of these illegal profits.

It is hard to understand in light of these facts how proponents of S. 995 can argue that mandatory claim reduction is necessary to prevent the "blackmail" of defendant price-fixers by their victims. It appears to us that if a change is necessary, it is one which would *increase* rather than *decrease* the ability of price-fixing victims to be made whole.

Because of the perverse incentives established by the mandatory claim reduction aspect of S. 995, we believe that the bill would sharply discourage the private enforcement of the antitrust laws. If price-fixing victims under existing law can only recover a small percentage

of their damages, why should they file cases in the future that would limit recovery through mandatory claim reduction? In a complex class action suit, there is some incentive to proceed based on the fact that each plaintiff will only have to pay a small part of the litigation costs, and recovering something is better than recovering nothing. But not every price-fixing case involves an enormous class of plaintiffs. In the *Burlington Industries* case, for example, a group of textile equipment manufacturers were found to have overcharged in a way that had its primary effect on the plaintiff, a single, large user of defendants' products. Why should plaintiffs in this situation file suits and begin costly and protracted litigation when they know that after trial, a defendant may have its liability limited to only a small fraction of the plaintiffs' actual damages?

The discouragement of private antitrust enforcement which is the inevitable result of S. 995 harms not only the plaintiffs who have paid the overcharges directly but have little incentive to sue, but also harms the general consuming public. In these days of limited Government resources, it is impossible for State and Federal enforcers to detect and prosecute all of the price-fixing activity that plagues our economy. Further, even if Government enforcement were feasible, the Federal Government cannot under present law collect treble damages, but rather, is limited in most civil cases to seeking injunctions or cease-and-desist orders. In unusual circumstances, the Government may be able to seek restitution, *see Binney & Smith, Inc.*, 96 F.T.C. 625 (1980), but this remedy is limited to actual, not treble damages. The large majority of price-fixing cases are filed by private parties, and financed through private, not taxpayer, moneys. The maintenance of this mechanism is essential to the health of the free enterprise system. Unfortunately, the claim reduction aspects of S. 995 would do much to undermine this valuable private enforcement tool.

D. THE LANGUAGE USED IN S. 995 TO MEASURE THE AMOUNT OF CLAIMS REDUCTION IS UNRELATED TO CULPABILITY AND WILL PRODUCE UNNECESSARY LITIGATION

S. 995 calls for the mandatory reduction of claims "by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services." In practice, if the settling person caused any of plaintiffs' injury, item (3) will almost always be the greatest amount.

It is obvious on the face of this provision that S. 995 calls for claims reduction in a manner which is totally unrelated to the relative fault of the defendants in causing the injury. In addition, the term "damages attributable to . . . sales or purchases" is undefined, and will allow defendants to complicate price-fixing cases needlessly by litigating over the meaning of the phrase.

One apparent reason for limiting the applicability of S. 995 to price-fixing suits is the presumption that "sales" is an easy test that would not, however, be appropriate in antitrust suits involving other types of violations, such as market division. Even in price-fixing cases, though, limiting plaintiffs' recovery from a given defendant to the plaintiffs' purchases from that party is an arbitrary means of divid-

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ing liability. For example, in a major class action case, do all the plaintiffs' total purchases from a settling defendant reduce the class' recovery, or must the court measure each plaintiff's purchases from each defendant? In the first situation, plaintiffs who have made no purchases from one defendant suffer the loss of that firm's "sales," while in the second case, the court would be faced with an almost impossible task of correlating purchases and sales among thousands of buyers and sellers. Some of the numerous questions that might be raised by this mischievous standard were discussed by one witness:

> What do you mean by "sales"? Do you mean unit sales? Do you mean dollar sales? Do you mean sales to these particular plaintiffs? Do you mean sales to other people in the industry? Do you mean sales abroad? What precisely is meant? I say that one phrase alone is going to give rise to years of litigation.
>
> Take, for example, the experience we had in the plywood case. Many of the companies did not sell anything of any consequence to the people who would be the plaintiffs. Most of their sales were to other defendants. Those other defendants had sales grossly disproportionate to their own production.
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> Over what period are the sales to be taken into account? Is it the period in the suit, which may be 15 or 20 years? Is it the period of the usual settlement, which may be 4 years? Is it the period the court finally says you can present claims in a class action? That also remains undefined in S. 995. Statement of Harold Kohn, May 11, 1981.

All of these issues would be resolved at the expense of the victims of price-fixing.

In addition to these problems in interpretation, the language of S. 995 does not even attempt to base the right of claim reduction on any principle of relative fault. One witness testified to a common type of price-fixing case in which the language of S. 995 would produce bizarre results:

> A bid-rigging conspiracy under which a number of competitors gets together and one of their members is selected to win the bid and the remaining members of the conspiracy are selected to submit higher bids is normally viewed as an agreement to fix, stabilize, or maintain prices—the prices paid by the governmental entity typically that requests bids.
>
> In that situation, however, by the very nature of the conspiracy there is only one person with any sales, the conspirator which was agreed upon by the conspiracy to submit the winning bid. Yet, all the other conspirators in the smoked-filled (sic) rooms where the bids were rigged are and should be liable for the conspiracy. That is an agreement to fix, maintain, and stabilize prices. Yet, S. 995 is totally illogical. It does not apply logically to that situation. Testimony of Kenneth Reed, May 11, 1981.

Another common situation where S. 995 would produce anomalous results is where the conspiracy has both national and regional aspects:

> (The bread litigation in Arizona) was a case where there were two national companies and two local companies. One of the national companies had two subsidiaries, so there were really five sellers in the marketplace.
>
> The two local companies, both of whom were the larger companies in the marketplace—between them they represented approximately 60 to 65 percent of the market—had difficult financial positions, one more than the other . . . If the two national companies had not agreed to a conspiracy, had not participated, there would not have been one. The purchases of bread in Arizona would not have been overcharged. Statement of Harold Kohn, May 11, 1981.

Thus, S. 995 might well limit the liability of the larger firms, who had few sales to the plaintiffs in Arizona, but were equally culpable and better able to pay the damages.

Finally, assuming that the linguistic difficulties could be worked out—a proposition which we find doubtful—mandatory claim reduction based on "sales" would require a determination of both product and geographic markets and the shares of each defendant, settling and nonsettling, in every price-fixing case. Under current law, price-fixing is a "per se" offense: It is illegal regardless of market power or specific economic effects. In so-called "rule of reason" cases, where plaintiffs must show that the anticompetitive effects of the conduct at issue outweigh any procompetitive effects, *see, e.g., National Society of Professional Engineers* v. *U.S.*, 435 U.S. 679 (1978), the relevant market must be proved to allow the court to assess the effects on competition in an economic context rather than in the abstract. In such cases, determination of markets and relative shares is often the most disputed and hence, time-consuming issue in the litigation. Under S. 995, however, market shares would be elements of the case, not to show the effects of the conspiracy, but merely to allocate damages among the defendants. It is probable that settling parties would be brought into this aspect of the case, because their sales and other marketing decisions would be highly relevant in measuring the nonsettling firms' liability. Thus, plaintiffs and cooperative defendants would be required to incur much additional expense in order to assist the remaining defendants in reducing their liability. This process would only serve to further complicate price-fixing cases, reduce the likelihood of private enforcement, and undermine the deterrent effect of such enforcement.

In summary, as Judge Will put it:

> I find it inexplicable that Congress would seriously consider making it the law of the land that a defendant who elects to stand trial will enjoy all the benefits of no liability and no damages if its wins, but will pass on to others the bulk of its losses if it loses. This is the kind of "heads I win, tails you lose" arrangement which the law generally frowns upon because it is basically unfair. Not only is it unfair, but, as previously indicated, it will so complicate already complex antitrust cases that they may become impossible to conduct. If Congress desires to repeal the antitrust laws, which I assume it does not, it should do so directly and not by making them unfair and impossibly complex. Judge Will Letter, March 17, 1982, at 4.

V. Retroactivity

A. Description of the Thurmond-Laxalt-Hatch Amendment

When this committee first reported out a bill on the subject of antitrust contribution—S. 1468—the legislation was applied only to future cases. In the more than two years since S. 1468 was approved by the committee, there has been an intense effort to make the bill applicable to cases pending in the courts at the time of enactment. This resulted in the addition to S. 995 of the so-called Thurmond-Laxalt-Hatch amendment, which would allow the claim reduction—but not the contribution—provisions of S. 995 to be applied retroactively to pending cases. The most significant portion of the amendment reads:

> (f)(1) The claim reduction principle of subsection (b) of this section shall also apply to actions alleging an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this act which are pending on the date of enactment of this section, if upon proof by any party subject to liability from damages in such an action, the court determines that it would be inequitable, in light of all the circumstances and notwithstanding subsection (f)(2), not to apply the principle in that action.

B. The Application of Claim Reduction to Pending Cases Will Undermine the Reasonable Expectations of Both Plaintiffs and Settling Defendants

Although there are some estimated 900 pending price-fixing cases in Federal courts, the retroactivity provisions of S. 995 are apparently intended to assist nonsettling defendants in three major cases: *Corrugated Containers*, M.D.L. 310, *Plywood*, M.D.L. 159, and *Burlington* Civ. No. 71-306 (D. S.Car.). Nearly all of the witnesses who testified before the committee represented firms involved in one of these cases. All of these cases have been in the courts for many years: The *Burlington* case, for example, was originally filed in 1969. Relying on the rules of joint and several liability, which have been part of the antitrust laws for as long as there has been private antitrust enforcement, attorneys for plaintiffs and some defendants have carefully worked out settlements that offered benefits to both sides of each case. In the *Corrugated* case, the trial court expressly relied on the joint and several liability standards in approving certain settlements:

> Most important, these are partial settlements that specifically and explicitly preserved plaintiff's right to litigate against all remaining defendants for the *entire* amount of plaintiff's damages, on the basis of joint and several liability, for *all* the injury caused by the conspiracy. The court considered this to be a valuable provision supporting the approval of the settlements. In effect, in each successive settlement, all the plaintiffs gave up was the right to recover that settlement amount against nonsettling defendants.

In re Corrugated Container Antitrust Litigation, 1981-1 Trade Cases (CCH) par. 64,114, at 76,703-76,704 (S.D. Tex. June 4, 1981 (emphasis in original).

We are now asked to make it possible for the nonsettling firm—which had many opportunities both prior to and after trial to settle for reasonable amounts—to escape liability which has been expressly found by a jury. We are asked, for example, to make it possible for the nonsettling defendants in the *Corrugated* case to escape the liability which the court expressly found was necessary in order to make the carefully negotiated settlements fair to the more than 200,000 victims of price-fixing who are the plaintiffs in that case. Although under S. 995 as reported the court must first examine the equities of applying claim reduction, to even raise the possibility that existing agreements might be unravelled and plaintiffs and settling defendants might be subjected to more litigation and uncertainty is grossly unfair and is bad public policy as well. Having chosen to litigate and and having lost, nonsettling firms in pending cases should be required to obey the rules which they knew existed throughout the years of litigation, and on which both sides have reasonably relied in making their tactical and strategic decisions.

Permitting these nonsettling firms to be relieved of their rightful obligations would be tremendously unfair to the thousands of small businesses who were overcharged for years by the proven price-fixing conspiracies. In the *Corrugated* case, for example, the plaintiff class has negotiated settlements from nearly all of the defendants which reimburse the price-fixing victims for only *15 percent of the actual damages* suffered as a result of the decade long conspiracy. These settlements were, as noted above, approved by the court on the express finding that the remainder of the damages during the statutory period would be recoverable from the nonsettling parties. The retroactivity provision of S. 995 would allow the court to reduce the nonsettling firm's exposure to aproximately one-tenth of its expected liability under current law. The victims of the conspiracy would have hundreds of millions of dollars of their rightful reimbursement taken out from under them. The antitrust laws provide for recovery of three times the amount of the actual damages suffered by victims of antitrust violations. The application of S. 995 to pending cases would allow the reduction of plaintiffs' recovery in *Corrugated* and other cases to only a small percentage of their actual injury. We cannot support the creation of such a gross injustice.

Applying S. 995 to pending cases would also be unfair to settling defendants, as their strenuous and repeated testimony against the retroactivity provisions of the bill shows. Despite the fact that the Thurmond-Laxalt-Hatch amendment purports to remove the courts' ability to modify or rescind existing settlements by the application of claim reduction to pending cases, settling defendants would be required to appear before the court to assist the determination of the amount of claim reduction. The bill requires reduction of claims in a manner related to relative sales by each firm, and settling firms would be required to testify and produce voluminous documents related to their participation in the markets at issue. This retroactive requirement will greatly increase the cost incurred by these firms as part of the litigation, and may well have affected the firms' decisions as to whether to settle or how much settlement would be worth if they had known about this requirement at the time of settlement.

In addition, many of these firms settled on the basis of their knowledge of the existing rules of joint and several liability. If they had known that their liability might be limited to their market share, they certainly would have either settled for less or perhaps not settled at all. S. 995 as reported would allow these firms to rescind their settlements if such an action is consented to by all the parties to the agreement. If this procedure is utilized, the effect of the retroactive application of claim reduction may well be to force plaintiffs and defendants in long-pending cases to go back to square one in negotiating settlements. Not only would this cause great additional expense and delay, it would require victims of price-fixing as well as previously settling firms to wait an indeterminate—but certainly lengthy—period before the issues are finally resolved. It would be unconscionable for the Congress to place this burden on so many firms which have acted in good faith over many years to resolve their disputes under known rules.[3]

C. DOUBTS AS TO THE CONSTITUTIONALITY OF RETROACTIVE CLAIM REDUCTION WOULD CREATE UNNECESSARY LITIGATION

The committee received the testimony of many constitutional law experts concerning the constitutionality of the retroactive application of claim reduction. It is not surprising that these experts reached differing results. While we do not express an opinion on this question, it is clear that the constitutional issues would require significant court attention and concommittent resource expenditure by the parties to pending cases. As one attorney representing plaintiffs in a pending case testified,

> Certainly they will have to litigate, and we the plaintiffs in the *Corrugated* case are going to make them litigate because there is too much doubt as to the constitutionality of applying S. 995 retroactively for us to fulfill our fiduciary duties to the class by settling at a small amount.

Testimony of Stephen D. Susman, Feb. 10, 1982.

[3] Of course, regardless of the parties' reliance, we also object to any application, retroactive or otherwise, of the bill's particular claim reduction formula. To the extent a court determines that claim reduction by more than the amount of settlement is appropriate, it must have the discretion to determine what that proper amount is in accordance with the concept noted in footnote 2, *supra*. S. 995 s claim reduction feature does not give courts that discretion.

SEPARATE VIEWS OF SENATORS MAX BAUCUS, JEREMIAH DENTON AND ROBERT DOLE ON S. 995

INTRODUCTION

We strongly support S. 995 as it was introduced by Senators Thurmond, Baucus, Laxalt, Hatch, DeConcini and Heflin. We believe that the contribution and claim reduction principles embodied in S. 995 will make our antitrust laws more just and equitable. Furthermore, we commend the Chairman for his leadership in pursuing this important legislation. However, we do not support the committee amendment which applies the legislation to pending cases. This amendment, which only narrowly passed the Committee, is unsound policy and needlessly jeopardizes the passage of otherwise highly desirable legislation.

SUPPORT FOR S. 995, AS INTRODUCED

The basic legislation would change the antitrust laws in two respects: First, by creating a new right of contribution permitting defendants in antitrust price-fixing cases to bring into the case other parties who were not sued by plaintiffs but may have been part of the price-fixing conspiracy; and, second, by creating a new statutory right of claim reduction, under which any judgment obtained by plaintiffs in a price-fixing case against defendants would have to be reduced by the market shares represented by any defendants who had settled their cases, rather than, as now, by only the dollar amount paid by the settling defendants.

We believe that the contribution and claim reduction principles embodied in S. 995 represent sound policy. They will permit businesses who are convinced of their innocence to litigate without fear of a devastating and disproportionate judgment; they will discourage "sweetheart settlements" and *in terrorem* tactics by plaintiffs; and they will make it more likely that defendants will be liable for their proportionate share of damages in a price-fixing conspiracy. It is for these reasons that we strongly support S. 995, as introduced.

OPPOSITION TO RETROACTIVITY

During its consideration of this legislation, the Judiciary Committee narrowly accepted an amendment which would apply the principles of S. 995 retroactively to pending cases. We believe this amendment represents bad policy and transformed S. 995 into a highly controversial piece of legislation.

It is important to remember that when legislation was originally introduced (see S. 1468, 96th Congress) it was to be applied prospectively to cases filed after the date of enactment. That bill passed the Senate Judiciary Committee with little controversy. Similarly, when

S. 995 was introduced early in the 97th Congress it included the same prospectivity provision.

There were very few serious concerns raised about the legislation until verdicts were entered in three major price-fixing cases: *Corrugated Containers*, M.D.L. 310, *Plywood*, M.D.L. 159, and *Burlington*, Civ. No. 71–306 (D.S. Car.). After these verdicts were entered, five of the losing defendants realized that S. 995 could provide them with an excellent opportunity to escape the potential judgments they were facing in their price-fixing cases. Since that time, the five companies have aggressively pursued their effort to use S. 995 as a vehicle to cut their liability for price-fixing.

Congress has historically disfavored retroactive legislation because it upsets the expectations of parties who have relied in good faith upon existing law. In the past, when Congress has applied antitrust legislation retroactively, it had a specific justification for remedying an unexpected and inappropriate FTC or court decision (see, Soft Drink Interbrand Competition Act, S. 598, 96th Congress). S. 995 does not present Congress with such a case. No one is arguing that the courts have interpreted the antitrust laws concerning joint and several liability in a manner that was inconsistent with Congress' intent or the parties' expectations.

In pending antitrust cases, plaintiffs and defendants have based their decision about whether to settle or litigate on the existing law which provides for full recovery in the event of settlements. Judges and juries have similarly relied on this rule in approving settlements and reaching verdicts. To change the rules in the middle of the game, as the retroactivity amendment to S. 995 would do, would be unfair and unjust to all of these parties. To do so solely to enable convicted price-fixers to reduce the damages which they would otherwise have to pay to the innocent businesses which have been injured by their misconduct is unconscionable.

There are additional problems with the retroactivity amendment to S. 995:

1. Noted constitutional law experts Charles Alan Wright of the University of Texas Law School and Ernest Gellhorn of the University of Virginia Law School have pointed out that retroactive claim reduction would raise serious due process questions, because it could deny plaintiffs the benefit of damages to which they were entitled under existing law.

2. Enormous disruption will take place in our already overburdened judicial system as litigation multiplies in scores of pending antitrust cases. Claim reduction, the constitutionality question and the preservation of settlements will be litigated at length, substantially prolonging cases that are already far too costly, complex and slow-moving. The "day in court" which the retroactivity amendment purports to provide will actually add years in court for everyone in order to benefit companies which have already had their day in court.

3. Congress would be sending a signal that it can be used as a court-of-last resort by parties found liable under existing law, undermining the deterrent value of our antitrust laws.

4. Many settlements entered in pending cases will be potentially threatened since their approval by Federal courts has been expressly premised on the rights of the parties under existing law, which would be overturned by the retroactivity amendment to S. 995.

For all of these reasons, objective observers have strongly opposed retroactive application of S. 995. The American Bar Association's Antitrust Section specifically opposed retroactivity on the ground that it would "upset settlement calculations already in progress, and . . . parties could be prejudiced who had already participated in the conduct of joint defense efforts on an assumption of no contribution." Editorial comment has been widespread around the country and virtually unanimous in opposition to retroactivity.

One final point ought to be noted. It could be argued with some justification that defendants in pending cases ought to be permitted to have the advantage of S. 995's provisions, particularly where there has not been extensive reliance upon existing law in terms of settlements, judgments on the merits or jury verdicts. The retroactivity amendment to S. 995 does *not* accomplish this. It would allow claim reduction to be applied in pending cases even after judgments and jury verdicts have been entered in favor of plaintiffs.

CONCLUSION

S. 995, as introduced, was a bill we strongly supported. We believe it was a relatively *non-controversial bill* that brought more common sense and fairness to our anti-trust laws.

The retroactivity amendment adopted by the Judiciary Committee has made S. 995 a highly controversial bill. It has turned a constructive piece of legislation into what has been referred to as a "bail-out" for price-fixers. The retroactivity amendment delayed our Committee's reporting of S. 995 for more than six months. We believe it will seriously reduce the bill's chances for enactment by the other House. We hope, and expect, therefore, that the full Senate will reject the retroactivity provision of the Committe bill, and move this important legislation forward.

MAX BAUCUS.
JEREMIAH DENTON.
ROBERT DOLE.

ADDITIONAL VIEWS OF MR. EAST

I will not repeat the persuasive arguments supporting prospective legislation allowing contribution and claim reduction in price-fixing cases. These arguments are well expressed and carefully documented in the views of the majority. Defendants should not be faced with liability so awesome that they must forgo an opportunity to prove their innocence before a jury.

Only when we come to the question of applying claim reduction retroactively do I differ with my colleagues and the Report of the majority. As a general rule, retroactive legislation is not favored nor is it customary. The wisdom of this policy is demonstrated by consideration of the effects of the bill, as modified by the amendment providing retroactive application, would have on the thousands of parties to pending cases.

Without question, application of claim reduction to a case in which settlements have already been made would forever bar the plaintiffs from recovering treble their full damages. By reducing the exposure of nonsettling defendants by treble the damages attributable to settling defendants, rather than the amount of the settlements, claim reduction would frustrate the antitrust policy of granting treble damages to injured plaintiffs. A purely prospective application of the bill would avoid this injustice because every party in future litigation would know of the new rule of claim reduction and conduct their settlement negotiations accordingly. There would be no "cheap" settlements to build a litigation war chest.

Years of uncertainty, litigation, and a tangle of legal problems will result if Congress makes claim reduction available retroactively. For example, the bill, as amended, conditions retroactivity upon a finding that it would be "inequitable" not to apply claim reduction. This standard would have to be litigated and ultimately defined by the Supreme Court, thus imposing substantial litigation costs and delays in collection of judgments on innocent plaintiffs.

In addition, the possible effects of retroactive application of claim reduction on existing settlements are troubling. While the bill expressly attempts to protect existing settlements, plaintiffs will surely seek to upset them, for that is the only manner in which they could recover their full treble damages. Some of the settlement agreements consummated in pending cases are conditioned on clauses that expressly preserve plaintiffs' rights to pursue remaining defendants for the entire amount of damages, based on joint and several liability. Litigation as to the validity of section (f)(2) would pull settling defendants back into lengthy litigation.

Serious constitutional questions are also raised by the retroactive legislation. Retroactive legislation must meet a higher due process

standard than prospective changes in laws. As the Supreme Court said in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–17 (1976), "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Retroactive application of this bill will surely be challenged in the courts.

For the foregoing reasons, I cannot support this bill as amended to have retroactive application. I hope that it can be enacted as originally introduced.

JOHN P. EAST.

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